TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903 1903 1904.

No. 343, 343

ANDREW J. AKERS, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED [illegible], 1904.

(24,000)

(18,485.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 297.

ANDREW J. AIKENS, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	3	2
Petition for writ of error	4	2
Order allowing writ of error	10	5
Judgment of supreme court of Wisconsin	11	5
Opinion of supreme court of Wisconsin	12	6
Citation	15	7
Bond on writ of error	16	8
Assignment of errors	18	9
Caption	21	10
Bond on writ of error to municipal court	22	10
Writ of error to municipal court	24	11
Transcript from the municipal court	25	12
Record entries	25	12
Capias	29	15
Information	30	16
Plea of Andrew J. Aikens	34	19
Order setting cause for trial	39	23
Notice of trial	40	24
Notice of motion to strike out plea of Aikens	41	25
Motion to strike out plea of Aikens	42	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1902.

	Original.	Print
Notice of motion to strike out plea of Aikens	44	27
Motion to strike out plea of Aikens	45	28
Order allowing exceptions of Aikens	47	29
Recognizance of Aikens on appeal	49	29
Bill of exceptions of Aikens	51	31
Notice of filing writ of error of Aikens	52	32
Copy of writ of error	53	33
Plea of Albert Huegin	55	33
Notice of motion to strike out plea of Huegin	60	37
Motion to strike out plea of Huegin	62	38
Notice of motion to strike out plea of Huegin	64	39
Motion to strike out plea of Huegin	65	39
Order allowing exceptions of Huegin	67	40
Recognizance of Huegin on appeal	69	41
Bill of exceptions of Huegin	71	42
Notice of filing writ of error of Huegin	72	44
Copy of writ of error	73	44
Demurrer of Melvin A. Hoyt	75	45
Order allowing exceptions of Hoyt	77	46
Recognizance of Hoyt on appeal	79	47
Bill of exceptions of Hoyt	81	48
Clerk's certificate to transcript	82	49
Clerk's return to writ of error	83	50
Order taking cause under advisement	84	51
Judgment	85	51
Opinion	86	51
Clerk's certificate	89	53

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Wisconsin before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Wisconsin plaintiff and Andrew J. Aikens defendant wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construc-
2 tion of a clause of the Constitution, of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened to the great damage of the said Andrew J. Aikens as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Seal U. S. Circuit Court, Western Dist. of Wisconsin, Madison.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and two.

F. W. OAKLEY,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin,
By F. D. REED, *Deputy.*

Allowed by

——— ———,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] Filed Mar. 11, 1902. Clarence Kellogg, clerk of supreme court, Wis.

STATE OF WISCONSIN, *Supreme Court,* } ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

4 STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Plaintiffs in Error.

To Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin:

The petition of Andrew J. Aikens, one of the plaintiffs in error above named, in his own right and behalf, respectfully represents that he is a citizen of the State of Wisconsin and of the United States, and a resident of the city of Milwaukee in said State and is there engaged, and has been for more than five years last past engaged, in the management and publication of a daily newspaper called The Evening Wisconsin. That during the period last aforesaid the above-named plaintiff in error, Melvin A. Hoyt, was engaged in the publication of another daily newspaper at the city of Milwaukee in said State called "The Milwaukee Daily News." And during the same period the above-named Albert Huegin was engaged in the publication of another daily newspaper at the city of Milwaukee in said State called "The Milwaukee Sentinel," both said Hoyt and said Huegin being at all times citizens of the State of Wisconsin and of the United States, residing at the city of Milwaukee
5 where each and all of said three papers had been and were then being published by said plaintiffs in error respectively.

That at said time and place there was also published in the city of Milwaukee by one Lucius W. Nieman and others a daily newspaper called "The Milwaukee Journal;" and that each of said papers, and each and every of the newspapers aforesaid was the property of a stock corporation, and each and every of the natural persons aforesaid was interested in the ownership of the respective papers and acting for it through an office or agency of said corporation owner, and that among the business of each of said newspapers was that of contracting for, receiving and publishing advertisements for hire.

That on the 7th day of October, A. D. 1901, in the municipal court of Milwaukee county, in the State of Wisconsin, that being a court of criminal jurisdiction for said county, an information against the above-named plaintiffs in error was filed by the district attorney

of the county of Milwaukee in said State in pursuance whereof warrants were issued and the said plaintiffs in error arrested and brought before said municipal court, and that thereafter and on November 11th, A. D. 1901, the plaintiffs in error duly appeared to plead to said information as required by law, and that your petitioner thereupon filed a plea in bar to the said information as shown in the record of this cause before said municipal court and before the supreme court of the State of Wisconsin, a true copy of which record containing said information and plea is herewith exhibited to your honor and — part hereof.

That thereafter and on November 20th, A. D. 1901, pursuant to adjournment duly had, said plea to said information was argued before said municipal court and then and there overruled by
6 said court and this petitioner, standing on his said plea, the said municipal court found your petitioner guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty-seven and $\frac{10}{100}$ dollars ($67.10) costs, and further adjudged that in default of such payment your petitioner be committed to the House of Correction for Milwaukee county until such fine and costs were paid, not, however, in all exceeding thirty days. Thereupon your petitioner tendered his exceptions to said finding and judgment of conviction, which exceptions were reduced to writing and allowed, and that a bill of exceptions was duly signed, sealed and certified in said cause, and that your petitioner, for the purpose of staying proceedings on said judgment of conviction, duly executed a bond to the State of Wisconsin with sureties conditioned as required by law, which said bond was duly approved by the judge of said municipal court who thereupon stayed all proceedings against your petitioner in said cause until the return of the remittitur from the supreme court of the State of Wisconsin to said municipal court. That thereafter a writ of error was duly issued by the supreme court of the State of Wisconsin in said cause in favor of your petitioner and on motion of your petitioner, and that upon said writ of error the record in said cause in said municipal court was duly certified and returned to the supreme court of the State of Wisconsin and came before said supreme court according to law; that thereafter and on February 1st, A. D. 1902, the State of Wisconsin appearing in said supreme court by its attorney general and this petitioner by his counsel, submitted said cause against your
7 petitioner to the said supreme court for decision without brief or argument on behalf of the State of Wisconsin and upon the joint brief in behalf of this petitioner and the other plaintiffs in error above named, and that the said supreme court of the State of Wisconsin on the 18th day of February, A. D. 1902, by its decision then and there duly given and rendered, affirmed the said judgment of conviction of the said municipal court in all respects and filed a written opinion therein, a copy of which is hereunto annexed and made a part of this petition.

And your petitioner further shows that in his said plea to said information and in the municipal court aforesaid and in the said su-

preme court aforesaid and at all times in the said cause he claimed immunity from prosecution or conviction under said information under and by virtue of the provisions of article XIV of the Constitution of the United States for that the acts charged in said information and admitted by his said plea were lawful and proper acts of trade competition and the right of your petitioner to do said acts could not be taken away from him by any statute of the State of Wisconsin or by any judicial decision of any court of that State. That in the municipal court and in said supreme court said contention so made of record and in said plea by your petitioner was overruled and the immunities, right and privilege so claimed by him denied.

And your petitioner further alleges that the said supreme court of the State of Wisconsin, as your petitioner is advised and submits, erred in its judgment in affirming the said judgment so removed
8 by said writ of error and thereby deprived your petitioner of his rights, privileges and immunities as a citizen of the State of Wisconsin and of the United States secured to him by the said article XIV of the Constitution of the United States. That in the proceedings and hearing of the said cause of your petitioner in the supreme court of the State of Wisconsin, there was necessarily drawn in question the validity of a certain statute of the State of Wisconsin as being repugnant to the Constitution of the United States, which statute was nevertheless adjudged by the said supreme court of the State of Wisconsin to be a valid statute; that the following is the statute of the State of Wisconsin, being section 4466*a* of the Wisconsin Statutes of 1898:

"Boycotting, strikes and lockouts. Injury to business; restraint of will.

"SECTION 4466*a*. Any two or more persons who shall combine, "associate, agree, mutually undertake or concert together for the "purpose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another from "doing or performing any lawful act, shall be punished by impris- "onment in the county jail not more than one year or by fine not "exceeding five hundred dollars."

And your petitioner further avers that in the decision of said cause by said supreme court of the State of Wisconsin there was necessarily drawn in question the validity of said statute on the ground of its being repugnant to article XIV of the Constitution of the United States and the decision of said supreme court was in favor of the validity of said statute, and that there was by said information and plea drawn in question the construction of said article XIV of the Constitution of the United States, and that the decision of said supreme court of the State of Wisconsin was against the title,
9 right, privilege and exemption specially set up in said plea in bar and claimed under article XIV of the said Constitu-

tion of the United States whereby a manifest error had happened to the great damage of the said Andrew J. Aikens and resulting in his conviction and sentence to fine and imprisonment as aforesaid.

And your petitioner further offers such security on granting a writ of error hereinafter prayed as your honor may require to the effect that he will prosecute his writ of error to effect and if he fail to make good his plea shall answer all damages and costs, and prays that the said security shall be taken as a supersedeas and stay of execution upon the judgment returned in said cause.

Wherefore your petitioner prays your honor to grant and allow to him a writ of error from the judgment of the said supreme court of the State of Wisconsin to be issued by the Supreme Court of the United States to the said supreme court of the State of Wisconsin to the end that the judgment of said supreme court of the State of Wisconsin may be reviewed by the Supreme Court of the United States and the rights, privileges and immunities secured by the said article XIV of the Constitution of the United States and the liberty, property and due process of law thereby secured to your petitioner may be adjudged and awarded to him; and for such further or other order as may be proper.

ANDREW J. AIKENS, *Petitioner*,
Per W. H. TIMLIN.

10 UNITED STATES OF AMERICA, } ss:
State of Wisconsin, }

Desiring to give petitioner, Andrew J. Aikens, an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition,

It is ordered, that a writ of error be allowed to said court and that the same be made a supersedeas, the bond in the penal sum of one thousand dollars herewith presented being approved.

In testimony witness my hand this 11th day of March, A. D. 1902.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

11 Be it remembered, that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, on the 7th day of January, A. D. 1902, on the fourteenth day of the term, to wit: on the 18th day of February, A. D. 1902. Present, John B. Cassoday, chief justice, John B. Winslow, R. D. Marshall, Charles V. Bardeen and Joshua E. Dodge, justices of said court, the following proceedings were had, *inter alia*, to wit:

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error. } Error to Municipal Court, Milwaukee County, State of Wisconsin.

This cause came on to be heard on the return to the writ of error issued herein, and was argued by counsel. On consideration

whereof, it is now here ordered and adjudged by this court, that the judgment of the municipal court of Milwaukee county, in this cause, be and the same is hereby affirmed, with costs against the said plaintiff in error taxed at the sum of —— dollars.

STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this twenty-sixth day of February, A. D. 1902.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

[Endorsed:] State of Wisconsin. Supreme court. Andrew J. Aikens, plaintiff in error, against State of Wisconsin, defendant in error. Certified copy of judgment.

12 STATE OF WISCONSIN:

In Supreme Court.

Nos. 7, 8, & 9, State.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Each of the plaintiffs in error sued out his proper writ to review a judgment of the municipal court of Milwaukee county, adjudging him guilty of having committed an offense by violating section 4466*a* R. S. 1898, as charged in the information. The sufficiency of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4466*a id.*, were considered by this court and sustained on a review of *habeas corpus* proceedings on writs of error, the causes being reported in 110 Wis. p. 189. On such review there was no question but that the complaint

fully satisfied the statute. It was challenged, and the statute as well, on constitutional grounds. After such decision the causes were remanded for further proceedings according to law, whereupon an information was duly filed, charging the accused persons in all respects substantially as in the complaint, which had been passed upon as aforesaid.

Upon being duly arraigned upon such information, Andrew J. Aikens and Albert Huegin separately filed pleas admitting the
13 charge made against them, but insisting that the same did not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute a punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis. 189. The trial court followed that decision as it was bound to do. As we understand the matter the information contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect pleaded guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

14 [Endorsed:] State of Wisconsin. In supreme court. State of Wisconsin, defendant in error, *vs.* Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, plaintiffs in error. Petition of Andrew J. Aikens for and order allowing writ of error to Supreme Court of the United States. (Original.) Filed Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis. W. H. Timlin, attorney for petitioner, Andrew J. Aikens.

15 UNITED STATES OF AMERICA, ss:

To the State of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty

days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Andrew J. Aikens is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 11th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed. Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

16 & 17 Know all men by these presents, that we, Andrew J. Aikens, as principal, and W. E Cramer and John F. Cramer, as sureties, are held and firmly bound unto the State of Wisconsin, in the full and just sum of one thousand dollars to be paid to the said State of Wisconsin, its certain attorney or assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of February, in the year of our Lord one thousand nine hundred and two.

Whereas lately at a term of the supreme court of the State of Wisconsin, and on February 18th, A. D. 1902, in a suit depending in said court between The State of Wisconsin, defendant in error, and Andrew J. Aikens, plaintiff in error, a judgment was rendered against the said Andrew J. Aikens and the said Andrew J. Aikens obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said State of Wisconsin citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof, now the condition of the above obligation is such, that if the said Andrew J. Aikens shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ANDREW J. AIKENS,
Per W. H. TIMLIN. [SEAL.]
W. E. CRAMER. [SEAL.]
JOHN F. CRAMER. [SEAL.]

Signed, sealed and delivered in presence of
JOHN PALLANGS.
W. A. BOOTH.

Approved by
JOHN B. CASSODAY,
Chief Justice.

[Endorsed:] State of Wisconsin. In supreme court. State of Wisconsin, defendant in error, *vs.* Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt, plaintiffs in error. Citation to State of Wisconsin and bond of Andrew J. Aikens. Due personal service admitted this 11th day of March, 1902. E. R. Hicks, attorney general. W. H. Timlin, attorney for A. J. Aikens. Filed March 11, 1902. Clarence Kellogg, clerk of supreme court, Wis.

18 STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, Plaintiff in Error.

Comes now the said Andrew J. Aikens plaintiff in error defendant in the above-entitled cause, and files the following assignments of error upon which he will rely:

(1.) That the court erred in sustaining the demurrer interposed by The State of Wisconsin plaintiff aforesaid and defendant in error in this court to the plea filed in said cause by the defendant Andrew J. Aikens plaintiff in error in this court, and by holding and deciding that the facts stated in said plea filed were not sufficient to constitute a defense to the matters and things charged in the information herein.

(2.) That the said court erred in determining that the said plea filed by the said defendant Andrew J. Aikens herein plaintiff in error was not a sufficient justification and defense herein under section 14 of the Constitution of the United States.

(3.) That the said court erred in sustaining the demurrer interposed by The State of Wisconsin plaintiff in this cause and defendant in error in this court to the plea of the defendant Andrew J. Aikens defendant in said cause plaintiff in error herein, and in not determining upon said plea that the information herein was

19 insufficient in law.

(4.) That the said court erred in adjudging upon the record before it, viz: the information of the said State and the plea thereunto of the said Aikens, said defendant Andrew J. Aikens plaintiff in error herein, guilty and sentencing him to fine and imprisonment and affirming the judgment of the trial court in that regard for that it appears from the record herein that such proceedings, sentence and conviction were in violation of the rights of the said defendant Andrew J. Aikens under section 14 of the amendments to the Constitution of the United States, in that it deprived him the said Andrew J. Aikens of the use of his property without due process of law and in that it deprived him of the liberty to make such contracts not inimical to the public health, welfare or morals as he had a right to make under said fourteenth amendment to the said Constitution of the United States, and in that it deprived him the said Andrew J. Aikens of his liberty and abridged

the privileges and immunities of said Andrew J. Aikens as a citizen of the United States and denied to him the equal protection of the law.

W. H. TIMLIN,
Attorney for Plaintiff in Error, Andrew J. Aikens.

20 [Endorsed:] State of Wisconsin. In supreme court. State of Wisconsin, defendant in error, *vs.* Andrew J. Aikens, plaintiff in error. Assignments of error. (Original.) Filed. Mar. 11, 1902 Clarence Kellogg, clerk of supreme court, Wis. W. H. Timlin, attorney for A. J. Aikens.

21 Pleas before the supreme court of the State of Wisconsin at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, the seventh day, of January, A. D. 1902.

Present: John B. Cassoday, chief justice, John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices. Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit: on the fifth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, Andrew J. Aikens, and filed in said court his certain bond on writ of error; and on the sixth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, the said Andrew J. Aikens, and filed in said court his certain writ of error, according to the statute in such case made and provided, and also the return to such writ of error, of the clerk of the municipal court of Milwaukee county, in said State, in the words and figures following, that is to say:

22 Know all men by these presents, that Andrew J. Aikens as principal, and William E. Cramer and John F. Cramer, as sureties, all of the city and county of Milwaukee and State of Wisconsin, are held and firmly bound to the State of Wisconsin in the sum of two hundred and fifty dollars ($250.00), lawful money of the United States, to be paid to the said State of Wisconsin, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals, and dated this 27th day of November, 1901.

Whereas, the above-bounden Andrew J. Aikens has sued a writ of error out of the supreme court of the State of Wisconsin directed to the judge of the municipal court for Milwaukee county, commanding that a transcript of the record in a certain criminal action upon an information for an alleged conspiracy to injure presented by the district attorney in behalf of said State of Wisconsin against said defendant and accused Andrew J. Aikens in said municipal court, wherein judgment was rendered against said Andrew J. Aikens, on November 20th, 1901, finding said accused defendant guilty, as

charged in said information, and sentencing him to pay a fine of $150.00, together with $67.10 costs, and in default of such payment to be committed to the House of Correction of Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days, be sent to said supreme court.

Now, the condition hereof is such that if the said Andrew J. Aikens shall well and truly pay all costs and damages which may be awarded against him on said writ of error, then this obligation shall be void, otherwise of force.

ANDREW J. AIKENS. [SEAL.]
JOHN F. CRAMER. [SEAL.]
WM. E. CRAMER. [SEAL.]

Sealed and delivered in presence of—
JOHN G. GREGORY.
JOHN PALLANGS.

23 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Wm. E. Cramer and John F. Cramer, being duly sworn, each for himself says that he is one of the subscribers to the foregoing bond; that he is a resident of the State of Wisconsin and is worth the sum of five hundred dollars ($500.00) over and above all his debts and liabilities, in property within the State of Wisconsin not by law exempt from execution.

W. E. CRAMER.
JOHN F. CRAMER.

Subscribed and sworn to before me, this 27th day of November, 1901.

J. E. BURS,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

My commission expires May 17, 1903.

I approve the foregoing bond both as to form and sufficiency of sureties this 5th day of December, 1901.

CLARENCE KELLOGG,
Clerk Sup. Court, Wis.

(Endorsements:) State of Wisconsin. In supreme court. State of Wisconsin, defendant in error, *vs.* Andrew J. Aikens, plaintiff in error. Bond of A. J. Aikens. Original. Filed Dec. 5, 1901. Clarence Kellogg, clerk of supreme court, Wis. W. H. Timlin, att'y for A. J. Aikens.

24 STATE OF WISCONSIN, } ss:
Supreme Court, }

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court

of Milwaukee county aforesaid, before you, between The State of Wisconsin, plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor, manifest error hath intervened to the great damage of the said Andrew J. Aikens, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid, being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness the Hon. John B. Cassoday, chief justice of the [SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

[Endorsed:] State of Wisconsin, supreme court. The State of Wisconsin, plaintiff, against Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants. Writ of error. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Filed Dec. 6, 1901. Clarence Kellogg, clerk of supreme court, Wis.

25 THE STATE OF WISCONSIN *vs.* ALBERT HUEGIN, ANDREW J. AIKENS, MELVIN A. HOYT. } No. 4192.

W. H. Bennett, district attorney.
W. H. Timlin, attorney for A. J. Aikens.
Van Dyke, Carter & Van Dyke, attorneys for A. Huegin.
N. S. Murphy, attorney for M. A. Hoyt.
Hon. A. C. Brazee, presiding judge.

July 5, 1900.—The original complaint, warrant and all other papers in this case from police court, Milwaukee, received and filed.

July 18, 1900.—All the original papers in this cause sent to the circuit court of Milwaukee county, on a petition of the defendants' counsel for a writ of *habeas corpus*.

July 2, 1901.—All the original papers in this cause returned to the municipal court from the clerk of the circuit court of Milwaukee county.

October 21, 1901.—Came the district attorney for the county of Milwaukee, and in open court filed an information against the above-named defendants, endorsed: State of Wisconsin, municipal court, Milwaukee county, *ss.* I hereby certify that on the 21st day

of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and produced their bodies in court, Theo. Zillmer, sheriff, per Fred Stark, deputy sheriff, fees, etc. Same day defendants severally present in court, whereupon the said defendants were arraigned in open court. Reading of the information waived by the defendants severally. And the said defendants, Andrew J. Aikens and Albert Huegin, each for himself filing a special plea in bar; and the said defendant Melvin A. Hoyt, entering and filing a demurrer to the information.

26 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN ET AL.

The judge of the above-mentioned court, having been at the time of the instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20, 1901, at ten o'clock a. m., as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court, before the said circuit judge, the Hon. Geo. W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m. of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing, notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court.

A. C. BRAZEE, *Judge.*

Milwaukee, November 11, 1901.

November 20, 1901.—Defendants with their attorneys all present in open court. Hon. Geo. W. Burnell, presiding judge. Motions of pleas before made argued by counsel and submitted, court ordered that the motion to strike out the plea of the defendants Huegin and Aikens be considered a demurrer, upon application of the district attorney and the defendants' counsel, the defendants' counsel consenting. Court further ordered that the demurrer of the State as to the defendants Huegin and Aikens be sustained, the defendants declining to plead over and stand upon their plea. The demurrer of the defendant Hoyt overruled

by the court, and the defendant declines to plead over and stands upon his plea. Recess taken until 2 o'clock p. m. Two o'clock p. m. defendants with their attorneys all present in open court. Cause submitted. Whereupon court called upon the de-
27 fendants, each of them, to give any reason they might have, why sentence should not be pronounced upon them, and they giving no reason, court did upon the findings and pleadings in this cause, find the said defendants severally guilty as charged in the information aforesaid and did adjudge and determine that the defendants Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, severally, and each of you, pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{1}{100}$ dollars, costs, each, or in default of the payment of said fine and costs to be committed to the House of Correction of Milwaukee county at hard labor until said fine and costs are paid, but such imprisonment shall not exceed in all thirty days each. And now comes the defendants severally, by their attorneys and files exceptions to the judgment of the court. Exceptions allowed by the court.

And now comes the defendants, severally and each of them, by their attorney, and ask for a stay of proceedings in this cause pending the defendants' appeal to the supreme court. Stay granted by the court, and pending the stay of proceedings court ordered that the defendants recognize in the sum of five hundred dollars each. Bail given.

Fines,	$450.00
Costs,	201.31
Total,	$651.31

Nov. 26, 1901.—Writ of error as to all of the defendants in above cause from the Hon. John B. Cassoday, chief justice of the State of Wisconsin, filed. Bill of exceptions as to all of the above-named defendants filed. Notice of filing writ of error from defendants' attorneys filed.

28 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court, do hereby certify that I have compared the foregoing copy with the original record entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court, this fourth day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

29 *Capias.*

STATE OF WISCONSIN, } ss:
Municipal Court for the City and County of Milwaukee, }

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

We command you, that you take Albert Huegin And. J. Aikens and Melvin A. Hoyt and them safely keep, so that you may have their bodies before the municipal court of the county of [SEAL.] Milwaukee aforesaid, at the court-room in Milwaukee, forthwith then and there to answer unto an information pending against them in said court for conspiracy to injure which shall then and there be made to appear, and of this writ make due return.

Witness, the Hon. A. C. Brazee, judge of the municipal court of said county and city at Milwaukee, the 21st day of October in the year of our Lord one thousand nine hundred and one.

FRANK E. WOLLER,
Clerk of the Municipal Court,
By THOS. V. DALLY, *Deputy.*

——— ———, *Attorneys.*

(Endorsements.)

STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I hereby certify that on the twenty-first (21st) day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, And. J. Aikens and Melvin A. Hoyt, and produced their bodies in court.

Fees.

Service	$2.00
Travel	.20
Attendance	4.50
Return	.25
Total	$6.95

THEODORE ZILLMER, *Sheriff,*
Per FRED STARK, *Dep. Sheriff.*

No. 4192. October term, A. D. 1901. Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Capias. Docket No. 2289. Theo. Zillmer, sheriff. Frank E. Woller, clerk of municipal court. Filed Oct. 21, 1901.

30 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

I, W. H. Bennett, district attorney for Milwaukee county, hereby inform the court that on the 5th day of April, in the year one thousand nine hundred, at the city of Milwaukee, and within said county of Milwaukee, Wisconsin, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did, then and there, unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business and for the purpose and with the intent then and there of wilfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said, The Journal Company, at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subse-
31 quently thereto, the said The Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of said The Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

That the prices for advertisements and the advertising rates which

newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900 said The Journal Company in good faith, established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

That at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee having an extensive circulation and devoted to the purposes of a general newspaper and to advertise for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and de-
32 voted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

That on or about the 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously and unlawfully injuring said The Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about 25 per cent. in excess of what said last-mentioned three

papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was
33 and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said last three mentioned newspapers because such merchant or other persons so prevented had paid or agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Wisconsin.

Dated at Milwaukee, in said county, this seventh day of October, in the year one thousand nine hundred and one.

W. H. BENNETT,
District Attorney, Milwaukee County, Wis.

(Endorsements.)

Prisoners arraigned in open court this 21st day of October, 1901, and the said defendants Andrew J. Aikens and Albert Huegin each for himself filing a special plea in bar, and the said defendant Melvin A. Hoyt entering and filing a demurrer to the information.

A. C. BRAZEE,
Municipal Judge.

Municipal court, Milwaukee county. State of Wisconsin against Andrew J. Aikens *et al.* Information for conspiracy. W. H. Bennett, district attorney. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

34 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Andrew J. Aikens in his own proper person cometh into court and having heard the information read, pleads thereto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred the Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April, A. D. one thousand nine hundred and subsequently thereto, the said The Journal Company, had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company, was and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholders in said The Journal Company and financially interested in the business and success of said The Journal Com-

35 pany; that the business and trade of the said Lucius W. Nieman is, among other things that of editor of said The Milwaukee

Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

And further, that the prices for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other said newspapers.

And further, that on or about the fifth day of April, A. D.
36 one thousand nine hundred, the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other

three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five per centum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of said combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were
37 pursuant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that pursuant to said combination, agreement and confederation and in furtherance thereof the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant or other persons so prevented had paid or agreed to pay to said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the herein-

before-mentioned acts, intentions and agreements and combinations were done, harbored, made and entered into in trade competition and that such hereinbefore-mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants, the said Albert Huegin and Melvin A. Hoyt, was, during all said times last mentioned and now is, a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of his said
38 codefendants was engaged at the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than the Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company or any stockholder thereof in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore, the said Andrew J. Aikens prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, etc.

ANDREW J. AIKENS.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens being duly sworn, says he has signed the foregoing plea and knows its contents and that the same is true.

ANDREW J. AIKENS.

Subscribed and sworn to before me, October 21, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

W. H. TIMLIN,
Attorney and Counselor at Law.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* A. J. Aikens *et al.* A. J. Aikens. Filed October 21, 1901. Frank E. Woller, clerk of municipal court.

39 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The judge of the above-mentioned court having been at the time of instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20th, 1901, at ten o'clock a. m., as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court, before the said circuit judge, the Hon. George W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m., of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court,

A. C. BRAZEE, *Judge.*

Milwaukee, November 11th, 1901.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Order setting case for trial. Filed Nov. 11, 1901. Frank E. Woller, clerk of municipal court.

40 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and Van Dyke, Van Dyke & Carter, his attorneys; to Andrew J. Aikens and Timlin, Glicksman & Conway, his attorneys, and to Melvin A. Hoyt and N. S. Murphy, his attorney:

Please take notice, that Hon. George W. Burnell, circuit judge of the third judicial circuit, who was heretofore called by Hon. A. C. Brazee, judge of the municipal court, has consented to attend and hold court during the trial of the above cause; and you, and each of you, are hereby notified that the above cause has been set for trial before said circuit judge, the Hon. George W. Burnell, Wednesday, November 20, 1901, at ten o'clock a. m. of said day, at the municipal court room, in the city hall of the city of Milwaukee, county of Milwaukee, Wisconsin.

By order of the court.

FRANK E. WOLLER,
Clerk of the Municipal Court.

Dated this 11th day of November, 1901.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 12th day of November, 1901, I served the within notice on the within named Albert Huegin, one of the defendants, on Van Dyke, Van Dyke & Carter, his attorneys; on Andrew J. Aikens, one of the defendants, on Timlin, Glicksman & Conway, his attorneys; and on Melvin A. Hoyt, one of the defendants; and on N. S. Murphy, his attorney, personally, by delivering to and leaving with each of them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on each copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$3.50
Copies	2.10
Travel	.20
Ret.	.25
	$6.05

Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* Notice of time of hearing. Filed Nov. 18, 1901. Frank E. Woller, clerk of municipal court. Docket No. 2490. Theodore Zillmer, sheriff.

41 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Andrew J. Aikens, and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1901.

42 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the

plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn, on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
43 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2518. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Andrew J. Aikens, personally, by delivering to and leaving with him a true copy thereof.

I further certify, that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret.	.25
	$2.25

44 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Andrew J. Aikens and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1901.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November. 1901, I served the within notice and affidavit annexed on the within-named Timlin, Glicksman & Conway personally by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date thereon, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff*,
By Z. CLAYTON, *Deputy*.

Service	1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

45 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the for-going petition and knows the
46 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Docket No. 2521. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court. W. H. Bennett, district attorney.

47 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Andrew J. Aikens, having filed and served a special plea in bar, and the district attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Andrew J. Aikens then and there duly excepted, said exception is hereby allowed and signed, and the said Andrew J. Aikens thereupon declared in open court that he stood upon said plea, and the court thereupon found Andrew J. Aikens guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67.10 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Andrew J. Aikens be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Andrew J. Aikens duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Andrew J. Aikens asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Andrew J. Aikens recognize to the State of Wisconsin in the sum of five hundred dollars, with sufficient sureties for his personal appearance at the supreme court at the next term
48 thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEORGE W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. W. H. Timlin, attorney for Andrew J. Aikens. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

49 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, of the county of Milwaukee, acknowledge ourselves to be indebted to

the State of Wisconsin in the sum of $500.00 *dollars*, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Andrew J. Aikens was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of 150.00 dollars, and costs taxed at 67.10 dollars, and to be committed to the House of Correction of said county, until such fine and costs are paid or discharged, such imprisonment not to exceed 30 days; and whereas, the said Andrew J. Aikens has presented exceptions under section 7220 R. S. which were allowed, preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin; now, therefore, if the said Andrew J. Aikens shall personally appear in the supreme court of the State of Wisconsin on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

50 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20th, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against A. J. Aikens. Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

51 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter was disqualified having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid, Andrew J. Aikens, appeared by W. H. Timlin, his attorney, and the following proceedings were had; Said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Andrew J. Aikens, and after hearing the said district attorney for said motion and the said W. H. Timlin, opposed, said motion was denied; whereupon the said district attorney asked that his motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said W. H. Timlin in behalf of the accused defendant Andrew J. Aikens, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Andrew J. Aikens then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Andrew J. Aikens declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{10}{100}$ (67.10) dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Andrew J. Aikens then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed, and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Andrew J. Aikens in the cause aforesaid.

Dated November 25, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff *vs.* Andrew J. Aikens, defendant. Bill of exceptions. W. H. Timlin, 105 Grand Av., Milwaukee, defendant's attorney. Due service admitted this 25th day of November, 1901.

W. H. Bennett, dist. att'y and attorney for plaintiff, State of Wisconsin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

52 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Andrew J. Aikens, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc.,
W. H. TIMLIN,
Attorney for A. J. Aikens, Defendant.

53 STATE OF WISCONSIN, *Supreme Court,* } ss:

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor manifest error hath intervened to the great damage of the said Andrew J. Aikens, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the [SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

54 Municipal court, Milwaukee county. State of Wisconsin, plaintiff *v.* Andrew J. Aikens *et al.*, defendants. Notice of filing writ of error. W. H. Timlin, 105 Grand Av., Milwaukee, A. J. Aikens' attorney. Due service admitted this 26th day of November, 1901. W. H. Bennett, district att'y & attorney for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

55 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Albert Huegin in his own proper person cometh into court and having heard the information read, pleads thereunto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred the Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April, A. D. one thousand nine hundred, and subsequently thereto, the said The Journal Company, had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company, was and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholders in said The Journal Company and financially interested in the business
56 and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is among other things that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

And further, that the prices for advertisements and the advertising rates which newspapers such as the said The Milwaukee Journal

and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other of said newspapers.

And further, that on or about the fifth day of April, A. D. one thousand nine hundred, the said Andrew J. Aikens, Albert Huegin
57 and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit, said The Milwaukee Sentinel, the Evening Wisconsin and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to

wit: about twenty-five per centum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of said combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were pur-
58 suant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that pursuant to said combination, agreement and confederation and in furtherance thereof the said Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant-, or other persons so prevented had paid or agreed to pay to said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the hereinbefore-mentioned acts, intentions and agreements and combinations were done, harbored, made and entered into in trade competition, and that such hereinbefore-mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants the said Andrew J. Aikens and Melvin A. Hoyt was during all said times last mentioned and now is a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of his said codefendants was engaged at the city of Milwaukee in the
59 county of Milwaukee in the State of Wisconsin in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than the Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company, or any stockholder thereof, in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore the said Albert Huegin prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, etc.

ALBERT HUEGIN.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Albert Huegin, being duly sworn, says he has signed the foregoing plea and knows its contents and the same is true.

ALBERT HUEGIN.

Subscribed and sworn to before me, October 21, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

GEO. D. VAN DYKE,
Attorney and Counselor at Law.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* A. Huegin *et al.* A. Huegin. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

60 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin, and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon thereafter as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 14th day of November, A. D. 1901.

61 (Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in the said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Albert Huegin, personally, by delivering to and leaving with him a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name, and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

62 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huegin, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huegin, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huegin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in this behalf on the part of said defendant, Albert Huegin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huegin be stricken out and that the said defendant, Albert Huegin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
63 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2519. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

64 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon thereafter as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 14th day of November, A. D. 1901.

65 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huegin, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huegin, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huegin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in this behalf on the part of said defendant, Albert Huegin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huegin be stricken out and that the said defendant, Albert Huegin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
66 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Van Dyke, Van Dyke & Carter, personally, by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2520. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

67 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Albert

Huegin, having filed and served a special plea in bar, and the district attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Albert Huegin then and there duly excepted, said exception is hereby allowed and signed, and the said Albert Huegin thereupon declared in open court that he stood upon said plea, and the court thereupon found Albert Huegin guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67.10 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Albert Huegin be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Albert Huegin duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Albert Huegin asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Albert Huegin recognize to the State of Wisconsin in the sum of $500 *dollars*, with sufficient sure-
68 ties for his personal appearance at the supreme court at the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. Geo. D. Van Dyke, attorney for Albert Huegin. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

69 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Albert Huegin, and J. H. Puelicher and Herman Bleyer, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Albert Huegin was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure, and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at sixty-seven and $\frac{10}{100}$ dollars, aggregating $217.10, and to be committed to the House of

Correction of said county, until such fine and costs are paid or discharged, such imprisonment not to exceed 30 days; and whereas, the said Albert Huegin has presented exceptions which were allowed and signed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin.

Now, therefore, if the said Albert Huegin shall personally appear in said supreme court on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

ALBERT HUEGIN.
HERMAN BLEYER.
J. H. PUELICHER.

70 STATE OF WISCONSIN, } ss:
Milwaukee County, }

J. H. Puelicher and Herman Bleyer, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

J. H. PUELICHER.
HERMAN BLEYER.

Subscribed and sworn to before me this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.
FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Albert Huegin. Recognizance for appeal. Approved as to form and sufficiency of sureties this 20th day of November, 1901. George W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

71 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN ET AL., Defendants.

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell judge presiding, who having

been called in by Judge A. C. Brazee for the reason that the latter was disqualified, having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid, Albert Huegin, appeared by George D. Van Dyke, his attorney, and the following proceedings were had; said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Albert Huegin and after hearing the said district attorney for said motion and the said Albert Huegin opposed said motion was denied; whereupon the said district attorney asked that his said motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said Geo. D. Van Dyke in behalf of the accused defendant Albert Huegin, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Albert Huegin then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Albert Huegin declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty seven and $\frac{10}{100}$ dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment to be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Albert Huegin then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause, the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Albert Huegin in the cause aforesaid.

Dated November 25, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff, *vs.* Albert Huegin, defendant. Bill of exceptions. Van Dyke, Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin, attorneys for defendant, Albert Huegin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

72 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Albert Huegin, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc., GEO. D. VAN DYKE,
Attorney for Albert Huegin, Defendant.

73 STATE OF WISCONSIN, } ss:
Supreme Court, }

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor manifest error hath intervened to the great damage of the said Albert Huegin, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, at Madison, this twenty-
[SEAL.] sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

74 (Endorsements:) Municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* A. J. Aikens *et al.*, defend-

ants. Notice of filing writ of error. Due service of the within notice admitted this 26th day of November, A. D. 1901. W. H. Bennett, district att'y and att'y for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

75 STATE OF WISCONSIN:

Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT, ANDREW J. AIKENS, and ALBERT HUEGIN, Defendants.

And the said Melvin A. Hoyt separately and in his own proper person, cometh into court here, and having heard the information read, saith that the said information, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and in addition thereto this defendant alleges, the following special objections to the said information, to wit:

(1.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the other defendants named in the said information, were such conspiracies, combinations, confederations, associations, agreements and understandings as this defendant and the said other defendants had a lawful right to make and enter into as forming a part of their legitimate trade and competition between the said defendants with the said Journal Company and its officers and stockholders in the lawful conduct of the business of this defendant and the said other defendants as publishers of the newspapers respectively conducted by the said defendants, and the said Journal Company.

(2.) That the several acts charged in the said information as having been performed by this defendant and the said other defendants, do not state any criminal offense known to the law, but such acts, and each and every of them, were lawful and legitimate acts of competition in trade such as this defendant and said other defendants had lawful right to perform in the law.

(3.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understand-
76 ings had between this defendant and the said other defendants Andrew J. Aikens and Albert Huegin, were such conspiracies, combinations, associations, agreements and mutual understandings as this defendant and the said other defendants, as citizens of the United States and the State of Wisconsin, had lawful right to make and enter into in the conduct and management of the said several newspapers so published by this defendant and the said other defendants, Andrew J. Aikens and the said Albert Huegin respectively, under the Constitution and laws of the United States, and especially under and by virtue of the provisions of article XIV. of the amend-

ments to the Constitution of the United States, and this defendant claims the protection thereof.

(4.) That the several acts charged therein, as having been done and performed by this defendant and the said other defendants, Andrew J. Aikens and Albert Huegin, in furtherance of the said alleged several conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the said other defendants, were severally and respectively such acts as this defendant and the said other defendants had lawful right to do and perform as citizens of the United States and of the State of Wisconsin, as lawful and legitimate conspiracies, combinations, confederations, associations, agreements and mutual understandings, in the conduct of the business of this defendant and the publications of his said newspaper, and that of the newspapers of said other defendants, and in the publication of the said newspapers published by them respectively, and that such acts were innocent acts and lawful acts of competition in the trade and business of this defendant and in the trade and business of the said other defendants, under the Constitution and laws of the United States and especially under the provisions of article XIV. of the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(5.) And because the said information does not state any fact or facts which constitute a criminal offense known to the laws of the State of Wisconsin, but the acts so charged were and are legitimate acts of trade and competition such as any citizen of said State might lawfully employ in the conduct of his business; and this he is ready to verify.

Wherefore, for want of a sufficient information in this behalf, the said Melvin A. Hoyt prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said information specified.

NEWTON S. MURPHEY,
Attorney for Melvin A. Hoyt, One of the Defendants.

(Endorsements:) State of Wisconsin, municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* Melvin A. Hoyt, Andrew J. Aikens and Albert Huegin, defendants. Demurrer of def't Hoyt. Filed Oct. 21st, 1901. Frank E. Woller, clerk of municipal court. N. S. Murphey, att'y for def't Hoyt.

77 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT ET AL., Defendants.

This cause coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Melvin A. Hoyt,

having filed and served a demurrer to the information filed herein and the court having overruled said demurrer, to which ruling the said Melvin A. Hoyt then and there duly excepted, said exception is hereby allowed, and the said Melvin A. Hoyt thereupon declared in open court that he stood upon said demurrer, and the court thereupon found said Melvin A. Hoyt guilty as charged in the information, and sentenced him to pay a fine of one hundred and fifty dollars together with $67.10, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Melvin A. Hoyt be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Melvin A. Hoyt duly excepted, and the exception is hereby allowed. And thereupon, the said Melvin A. Hoyt asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Melvin A. Hoyt recognize to the State of Wisconsin in the sum of $500.00, with sufficient sureties for his personal appearance at the supreme court at
78 the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Melvin A. Hoyt *et al.* Exceptions. N. S. Murphey, attorney for Melvin A. Hoyt. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

79 STATE OF WISCONSIN, *Milwaukee County,* } ss:

In the Municipal Court of the County of Milwaukee.

We, Melvin A. Hoyt, Frederick Seibel and George Brumder, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Melvin A. Hoyt was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at sixty-seven and $\frac{10}{100}$ dollars, and to be committed to the House of Correction of said county, until such fine and costs are paid or discharged, such imprisonment not to exceed thirty days; and whereas, the said Melvin A. Hoyt

has presented exceptions under R. S. section 7220 which were allowed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin;

Now, therefore, if the said Melvin A. Hoyt shall personally appear in said supreme court of the State of Wisconsin, on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and *to* enter and prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of effect.

Dated, Milwaukee, this 20th day of November, 1901.

MELVIN A. HOYT.
FRITZ SEIBEL.
GEO. BRUMDER.

80 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Fred Seibel and Geo. Brumder, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

FRITZ SEIBEL.
GEO. BRUMDER.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Melvin A. Hoyt *et al.* Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

81 STATE OF WISCONSIN:

In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff, }
vs.
MELVIN A. HOYT ET AL., Defendants. }

At a regular term of said court holden on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter

judge was disqualified to try said cause, having heretofore acted for the said State in this matter, as district attorney for the county of Milwaukee, the State of Wisconsin appearing by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant Melvin A. Hoyt aforesaid appearing by Newton S. Murphey, his attorney, and the following proceedings were had: The said cause coming on to be heard upon the demurrer heretofore filed by the said defendant Melvin A. Hoyt to the information filed herein by said district attorney, and after hearing the said district attorney for the State in opposition to the said demurrer, and the defendant Melvin A. Hoyt by his said attorney in support thereof, and the court being advised in the premises, whereupon the court ordered that the said demurrer of the said defendant Melvin A. Hoyt be and the same was thereby overruled, to which ruling the said defendant Melvin A. Hoyt then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Melvin A. Hoyt declared that he stood upon said demurrer and did not desire to plead over. The court thereupon found the said defendant Melvin A. Hoyt guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty-seven and $\frac{10}{100}$ dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said defendant Melvin A. Hoyt then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Melvin A. Hoyt in the cause aforesaid.

Dated November 23, A. D. 1901.

GEORGE W. BURNELL, [SEAL.]
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin plaintiff *v.* Melvin A. Hoyt *et al.*, defendants. Bill of exceptions. We consent that Judge Burnell may sign and seal within as bill of exceptions in above cause. Nov. 22, 1901. W. H. Bennett, dist. att'y Mil. Co., Wis. Newton S. Murphey, att'y for def't. Melvin A. Hoyt. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Newton S. Murphey, att'y for def't Melvin A. Hoyt. Filed Dec. 6, 1901. Clarence Kellogg, clerk of supreme court, Wis.

82 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that I have compared the foregoing copies with the original capias, information for conspiracy, plea of A. J.

Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens, plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing writ of error of defendant, Albert Huegin; demurrer of defendant Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court this 4th day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

83 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that pursuant to the command of the annexed writ of error, I herewith transmit to the supreme court of the State of Wisconsin, certified copies of all of the original papers filed in the therein-entitled action, together with a certified copy of the original record entered in said action, and I further certify that the foregoing are certified copies of all said original papers, being the original capias, information for conspiracy, plea of A. J. Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens; plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing writ of error of defendant, Albert Huegin; demurrer of defendant, Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant, Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, filed and entered in the action therein entitled and of record in my office.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court this 4th day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

84 And afterwards, to wit: on the first day of February, A. D. 1902, the same being the thirteenth day of said term, the following proceedings were had in this court, in said cause, that is to say:

Milwaukee Municipal Court.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

And now at this day came the parties herein by their attorneys and submitted this cause to the court on case and briefs, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

85 And afterwards, to wit: on the eighteenth day of February, A. D. 1902, the same being the fourteenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Milwaukee Municipal Court.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Opinion by Justice Marshall.

This cause came on to be heard on the return to the writ of error issued herein, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the municipal court of Milwaukee county, in this cause, be and the same is hereby affirmed, with costs against the said plaintiff in error taxed at the sum of — dollars.

Justice Dodge took no part.

86 And thereupon, this court, by Justice Marshall, filed its opinion in said cause, in the words and figures following, that is to say:

STATE OF WISCONSIN:

In Supreme Court.

Nos. 7, 8 and 9, State.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Each of the plaintiffs in error sued out his proper writ to review a judgment of the municipal court of Milwaukee county, adjudging him guilty of having committed an offense by violating section 4466*a* R. S. 1898, as charged in the information. The sufficiency of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4466*a* *id.*, were considered by this court and sustained on a review of *habeas*
87 *corpus* proceedings on writs of error, the causes being reported in 110 Wis. p. 189. On such review there was no question but that the complaint fully satisfied the statute. It was challenged, and the statute as well, on constitutional grounds. After such decision the causes were remanded for further proceedings according to law, whereupon an information was duly filed, charging the accused persons in all respects substantially as in the complaint, which has been passed upon as aforesaid.

Upon being duly arraigned upon such information, Andrew J. Aikens and Albert Huegin separately filed pleas admitting the charge made against them, but insisting that the same did not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute a punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information, and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis. 189. The trial court followed that decision as it was bound to do. As we understand the matter the information contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect pleaded guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

88

By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

89

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above-entitled cause.

That the original writ of error, the petition therefor, the citation with its service endorsed thereon, the assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this 7th day of April, 1902.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 18,485. Wisconsin supreme court. Term No. 297 Andrew J. Aikens, plaintiff in error, *vs.* The State of Wisconsin. Filed April 11th, 1902.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 254.

ALBERT HUEGIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED APRIL 11, 1902.

(18,486.)

(18,486.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 298.

ALBERT HUEGIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	3	2
Petition for writ of error	4	2
Order allowing writ of error	9	5
Opinion of supreme court of Wisconsin	10	6
Judgment of supreme court of Wisconsin	13	7
Citation	14	8
Bond on writ of error	16	8
Assignment of errors	17	9
Caption	20	10
Bond on writ of error to municipal court	21	10
Writ of error to municipal court	23	12
Transcript from the municipal court	24	12
Record entries	24	12
Capias	28	15
Information	29	16
Plea of Andrew J. Aikens	33	19
Order setting cause for trial	38	24
Notice of trial	39	25
Notice of motion to strike out plea of Aikens	40	25
Motion to strike out plea of Aikens	41	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1902.

	Original.	Print
Notice of motion to strike out plea of Aikens	43	27
Motion to strike out plea of Aikens	44	28
Order allowing exceptions of Aikens	46	29
Recognizance of Aikens on appeal	48	29
Bill of exceptions of Aikens	50	31
Notice of filing writ of error of Aikens	51	32
Copy of writ of error	52	32
Plea of Albert Huegin	54	33
Notice of motion to strike out plea of Huegin	61	37
Motion to strike out plea of Huegin	63	38
Notice of motion to strike out plea of Huegin	65	39
Motion to strike out plea of Huegin	66	39
Order allowing exceptions of Huegin	69	41
Recognizance of Huegin on appeal	70	41
Bill of exceptions of Huegin	72	42
Notice of filing writ of error of Huegin	73	44
Copy of writ of error	74	44
Demurrer of Melvin A. Hoyt	76	45
Order allowing exceptions of Hoyt	78	46
Recognizance of Hoyt on appeal	80	47
Bill of exceptions of Hoyt	82	48
Clerk's certificate to transcript	83	49
Clerk's return to writ of error	84	50
Order taking cause under advisement	85	51
Judgment	86	51
Opinion	87	51
Clerk's certificate	90	53

1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Wisconsin before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Wisconsin, defendant in error against Albert Huegin plaintiff in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
2 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Albert Huegin plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Seal U. S. Circuit Court, Western Dist. of Wisconsin, Madison.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and two.

F. W. OAKLEY,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin,
By F. D. REED, *Deputy.*

Allowed by

——— ———,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] Sup. Ct. of the U. S. Albert Huegin pl'ff in error *v.* The State of Wisconsin def't in error Writ of error Filed. Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

STATE OF WISCONSIN, *Supreme Court,* } *ss:*

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

4 STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Plaintiffs in Error.

To Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin:

The petition of Albert Huegin, one of the plaintiffs in error above named, in his own right and behalf, respectfully represents that he is a citizen of the State of Wisconsin and of the United States, and a resident of the city of Milwaukee in said State, and at the times hereinafter mentioned was engaged, and had been for more than five years prior thereto, in the management and publication of a daily newspaper called "The Milwaukee Sentinel." That during the period last aforesaid the above-named plaintiff in error, Melvin A. Hoyt, was engaged in the publication of another daily newspaper at the city of Milwaukee in said State called "The Milwaukee Daily News." And during the same period the above-named Andrew J. Aikens was engaged in the publication of another daily newspaper at the city of Milwaukee in said State called "The Evening Wisconsin," both said Hoyt and said Aikens being at all times citizens of the State of Wisconsin and of the United States, residing at the city of Milwaukee where each and all of said three papers had been and were then being published by said plaintiffs in error respectively.

That at said time and place there was also published in the city of Milwaukee by one Lucius W. Nieman and others a daily newspaper called "The Milwaukee Journal;" and that each of said papers, and each and every of the newspapers aforesaid was the property of a stock corporation, and each and every of the natural persons aforesaid was interested in the ownership of the re-

5 spective papers and acting for it through an office or agency of said corporation owner, and that among the business of

each of said newspapers was that of contracting for, receiving and publishing advertisements for hire.

That on the 7th day of October, A. D. 1901, in the municipal court of Milwaukee county, in the State of Wisconsin, that being a court of criminal jurisdiction for said county, an information against the above-named plaintiffs in error was filed by the district attorney of the county of Milwaukee in said State in pursuance whereof warrants were issued and the said plaintiffs in error arrested and brought before said municipal court, and that thereafter and on November 11th, A. D. 1901, the plaintiffs in error duly appeared to plead to said information as required by law, and that your petitioner thereupon filed a plea in bar to the said information as shown in the record of this cause before said municipal court and before the supreme court of the State of Wisconsin, a true copy of which record containing said information and plea is herewith exhibited to your honor.

That thereafter and on November 20th, A. D. 1901, pursuant to adjournment duly had, said plea to said information was argued before said municipal court and then and there overruled by said court and this petitioner, standing on his said plea, the said municipal court found your petitioner guilty as charged in the information and sentenced him to pay a fine of one hundred and fifteen dollars, together with sixty-seven and $\frac{10}{100}$ dollars ($67.10) costs, and further adjudged that in default of such payment your petitioner be committed to the House of Correction for Milwaukee county until such fine and costs were paid, not, however, in all exceeding thirty days. Thereupon your petitioner tendered his exceptions to said finding and judgment of conviction, which exceptions were reduced to writing and allowed, and that a bill of exceptions was duly signed, sealed and certified in said cause, and that your petitioner, for the purpose of staying proceedings on said judgment of conviction, duly executed a bond to the State of Wisconsin with sureties conditioned as required by law, which

6 said bond was duly approved by the judge of said municipal court who thereupon stayed all proceedings against your petitioner in said cause until the return of the remittitur from the supreme court of the State of Wisconsin to said municipal court. That thereafter a writ of error was duly issued by the supreme court of the State of Wisconsin in said cause in favor of your petitioner and on motion of your petitioner, and that upon said writ of error the record in said cause in said municipal court was duly certified and returned to the supreme court of the State of Wisconsin and came before said supreme court according to law; that thereafter and on February 1st, A. D. 1902, the State of Wisconsin appearing in said supreme court by its attorney general and this petitioner by his counsel, submitted said cause against your petitioner to the said supreme court for decision without brief or argument on behalf of the State of Wisconsin and upon the joint brief in behalf of this petitioner and the other plaintiffs in error above named, and that the said supreme court of the State of Wisconsin on the 18th day of February, A. D. 1902, by its decision then

and there duly given and rendered, affirmed the said judgment of conviction of the said municipal court in all respects and filed a written opinion therein, a copy of which is hereto annexed and made a part of this petition.

And your petitioner further shows that in his said plea to said information and in the municipal court aforesaid and in the said supreme court aforesaid and at all times in the said cause he claimed immunity from prosecution or conviction under said information under and by virtue of the provisions of article XIV of the Constitution of the United States for that the acts charged in said information and admitted by his said plea were lawful and proper acts of trade competition and the right of your petitioner to do said acts could not be taken away from him by any statute of the State of Wisconsin or by any judicial decision of any court of that State. That in the municipal court and in said supreme court said contention so made of record and in said plea by your petitioner was overruled and the immunities, right and privilege so claimed by him denied.

7 And your petitioner further alleges that the said supreme court of the State of Wisconsin, as your petitioner is advised and submits, erred in its judgment in affirming the said judgment so removed by said writ of error and thereby deprived your petitioner of his rights, privileges and immunities as a citizen of the State of Wisconsin and of the United States secured to him by the said article XIV of the Constitution of the United States. That in the proceedings and hearing of the said cause of your petitioner in the supreme court of the State of Wisconsin, there was necessarily drawn in question the validity of a certain statute of the State of Wisconsin as being repugnant to the Constitution of the United States, which statute was nevertheless adjudged by the said supreme court of the State of Wisconsin to be a valid statute; that the following is the statute of the State of Wisconsin, being section 4466*a* of the Wisconsin Statutes of 1898:

"Boycotting, strikes and lockouts. Injury to business; restraint of will.

"SECTION 4466*a*. Any two or more persons who shall combine, "associate, agree, mutually undertake or concert together for the "purpose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another from "doing or performing any lawful act, shall be punished by impris- "onment in the county jail not more than one year or by fine not "exceeding five hundred dollars."

And your petitioner further avers that in the decision of said cause by said supreme court of the State of Wisconsin there was necessarily drawn in question the validity of said statute on the ground of its being repugnant to article XIV of the Constitution of the United States and the decision of said supreme court was in favor of the

validity of said statute, and that there was by said information and plea drawn in question the construction of said article XIV of the Constitution of the United States, and that the decision of said supreme court of the State of Wisconsin was against the title, right, privilege and exemption specially set up in said plea in bar and claimed under article XIV of the said Constitution of the United States whereby a manifest error had happened to the great damage of the said Albert Huegin and resulting in his conviction and

8 sentence to fine and imprisonment as aforesaid.

And your petitioner further offers such security on granting a writ of error hereinafter prayed as your honor may require to the effect that he will prosecute his writ of error to effect and if he fail to make good his plea shall answer all damages and costs, and prays that the said security shall be taken as a supersedeas and stay of execution upon the judgment returned in said cause.

Wherefore your petitioner prays your honor to grant and allow to him a writ of error from the judgment of the said supreme court of the State of Wisconsin to be issued by the Supreme Court of the United States to the said supreme court of the State of Wisconsin to the end that the judgment of said supreme court of the State of Wisconsin may be reviewed by the Supreme Court of the United States and the rights, privileges and immunities secured by the said article XIV of the Constitution of the United States and the liberty, property and due process of law thereby secured to your petitioner may be adjudged and awarded to him; and for such further or other order as may be proper.

ALBERT HUEGIN, *Petitioner.*

9 UNITED STATES OF AMERICA, } ss:
State of Wisconsin, }

Desiring to give petitioner, Albert Huegin, an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition,

It is ordered, that a writ of error be allowed to said court and that the same be made a supersedeas, the bond in the penal sum of one thousand dollars herewith presented being approved.

In testimony witness my hand this 11th day of March A. D. 1902.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed. Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

10 Nos. 7, 8, & 9.

STATE OF WISCONSIN:

In Supreme Court.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Each of the plaintiffs in error sued out his proper writ to review a judgment of the municipal court of Milwaukee county, adjudging him guilty of having committed an offense by violating section 4466*a* R. S. 1898, as charged in the information. The sufficiency of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4466*a id.*, were considered by this court and sustained on a review of *habeas corpus* proceedings on writs of error, the causes being reported in 110 Wis. p. 189. On such review there was no question but that the complaint fully satisfied the statute. It was challenged, and the statute as well, on constitutional grounds. After such decision the causes were remanded for further proceedings according to law, whereupon an information was duly filed, charging the accused persons in all respects substantially as in the complaint, which had been
11 passed upon as aforesaid.

Upon being duly arraigned upon such information, Andrew J. Aikens and Albert Huegin separately filed pleas admitting the charge made against them, but insisting that the same did not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis. 189. The trial court followed that decision as it was bound to do. As we understand the matter the information contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect pleaded guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

12 By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

13 Be it remembered, that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, on the 7th day of January, A. D. 1902, on the fourteenth day of the term, to wit: on the 18th day of February, A. D. 1902. Present, John B. Cassoday, chief justice, John B. Winslow, R. D. Marshall, Charles V. Bardeen and Joshua E. Dodge, justices of said court, the following proceedings were had, *inter alia*, to wit:

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.
} Error to Municipal Court, Milwaukee County, State of Wisconsin.

This cause came on to be heard on the return to the writ of error issued herein, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the municipal court of Milwaukee county, in this cause, be and the same is hereby affirmed, with costs against the said plaintiff in error taxed at the sum of —— dollars.

STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this twenty-sixth day of February, A. D. 1902.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

[Endorsed:] State of Wisconsin. Supreme court. Albert Huegin, plaintiff in error, against State of Wisconsin, defendant in error. Certified copy of judgment.

14 UNITED STATES OF AMERICA, *ss:*

To the State of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Albert Huegin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 11th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

15 [Endorsed:] Sup. Ct. of the U. S. Albert Huegin pl'ff in error *vs.* The State of Wisconsin def't in error Citation on writ of error Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin. Attorneys for pl'ff in error Service admitted this 11th day of March 1902. E. B. Hicks, att'y gen'l State of Wisconsin. Filed Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

16 Know all men by these presents, that we, Albert Huegin, as principal, and George Brumder and S. A. Eckstein, as sureties, are held and firmly bound unto the State of Wisconsin, in the full and just sum of one thousand dollars to be paid to the said State of Wisconsin, its certain attorneys or assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand nine hundred and two.

Whereas lately at a term of the supreme court of the State of Wisconsin, and on February 18th, A. D. 1902, in a suit depending in said court between The State of Wisconsin, defendant in error, and Albert Huegin, plaintiff in error, a judgment was rendered against the said Albert Huegin, and the said Albert Huegin obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said State of Wisconsin citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof, now the condition of the above obligation is such, that if the said Albert Huegin shall pros-

ecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation is void, else to remain in full force and virtue.

ALBERT HUEGIN, [SEAL.]
By G. D. VAN DYKE,
His Attorney-in-fact.
GEO. BRUMDER. [SEAL.]
S. A. ECKSTEIN. [SEAL.]

Signed, sealed and delivered in presence of
FRITZ ZEIBUL.
W. GASKELL.

Approved by
JOHN B. CASSODAY,
Chief Justice.

[Endorsed:] Bond on writ of error. Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin. Filed March 11, 1902. Clarence Kellogg, clerk of supreme court, Wisconsin.

17 STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
ALBERT HUEGIN, Plaintiff in Error.

Albert Huegin, the plaintiff in error files the following assignments of error upon which he will rely, viz:

(1.) The court erred in sustaining the demurrer interposed by the State of Wisconsin to the plea filed by said Albert Huegin, and by holding and deciding that the facts stated in said plea were not sufficient to constitute a defense to the matters and things charged in the information.

(2.) The court erred in determining that the plea filed by said Albert Huegin was not a sufficient justification and defense under the XIV amendment of the Constitution of the United States.

(3.) The court erred in sustaining the demurrer of the State of Wisconsin to the plea of Albert Huegin and in not determining upon said plea that the information was insufficient in law.

(4.) The court erred in adjudging Albert Huegin guilty on the record before it, viz: said information and plea, and sentencing him to fine and imprisonment and affirming the judgment of the trial court in that regard for the reason that said record shows that said sentence and conviction were in violation of the rights of said Albert Huegin under the XIV amendment of the Constitution of the United States, in that it deprived him of the use of his property without due process of law, and in that it deprived him of the liberty guaranteed him by said XIV amendment to make contracts not inim-

ical to public health, welfare or morals, and in that it deprived
18 the said Albert Huegin of his liberty and abridged the privileges and immunities of said Albert Huegin as a citizen of the United States, and denied to him the equal protection of law.

G. D. VAN DYKE,
Attorney for Albert Huegin, Plaintiff in Error.

19 [Endorsed:] State of Wisconsin, in supreme court. State of Wisconsin, defendant in error, *vs.* Albert Huegin, plaintiff in error. Assignment of error. Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin, attorneys for plaintiff in error, Albert Huegin. Filed. Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

20 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, the seventh day, of January, A. D. 1902.

Present: John B. Cassoday, chief justice, John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices. Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit: on the fifth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, Albert Huegin and filed in said court his certain bond on writ of error; and on the sixth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, the said Albert Huegin, and filed in said court his certain writ of error, according to the statute in such case made and provided, and also the return to such writ of error, of the clerk of the municipal court of Milwaukee county, in said State, in the words and figures following, that is to say:

21 Know all men by these presents, that Albert Huegin as principal, and S. A. Eckstein and E. A. Bouer, as sureties, all of the city and county of Milwaukee and State of Wisconsin, are held and firmly bound to the State of Wisconsin in the sum of two hundred and fifty dollars ($250.00), lawful money of the United States, to be paid to the said State of Wisconsin, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals, and dated this 30 day of November, 1901.

Whereas, the above-bounden Albert Huegin has sued a writ of error out of the supreme court of the State of Wisconsin directed to the judge of the municipal court for Milwaukee county, commanding that a transcript of the record in a certain criminal action upon an information for an alleged conspiracy to injure presented by the district attorney in behalf of said State of Wisconsin against said defendant and accused Albert Huegin in said municipal court, wherein judgment was rendered against said Albert Huegin, on November

20th, 1901, finding said accused defendant guilty, as charged in said information, and sentencing him to pay a fine of $150.00, together with $67.10 costs, and in default of such payment to be committed to the House of Correction of Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days, be sent to said supreme court.

Now, the condition hereof is such that if the said Albert Huegin shall well and truly pay all costs and damages which may be awarded against him on said writ of error, then this obligation shall be void, otherwise of force.

ALBERT HUEGIN. [SEAL.]
S. A. ECKSTEIN. [SEAL.]
E. A. BOUER. [SEAL.]

Sealed and delivered in presence of—
O. TRAUB.
A. J. KRAATZ.

22 STATE OF WISCONSIN, } ss:
Milwaukee County, }

S. A. Eckstein and E. A. Bouer, being duly sworn, each for himself says that he is one of the subscribers to the foregoing bond; that he is a resident of the State of Wisconsin and is worth the sum of five hundred dollars ($500.00) over and above all his debts and liabilities, in property within the State of Wisconsin not by law exempt from execution.

S. A. ECKSTEIN.
E. A. BOUER.

Subscribed and sworn to before me, this 30 day of November, 1901.
R. J. HAMMEN,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

My commission expires August 13, 1905.

I approve the foregoing bond both as to form and sufficiency of sureties this 5th day of December, 1901.
CLARENCE KELLOGG,
Clerk Sup. Court, Wis.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* Albert Huegin, defendant. Bond. Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin, attorneys for defendant Albert Huegin. Filed Dec. 5, 1901. Clarence Kellogg, clerk of supreme court, Wis.

23 STATE OF WISCONSIN, } ss:
Supreme Court, }

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin, plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor, manifest error hath intervened to the great damage of the said Albert Huegin as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid, being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness the Hon. John B. Cassoday, chief justice of the
[SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

[Endorsed:] State of Wisconsin, supreme court. The State of Wisconsin, plaintiff, against Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants. Writ of error. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Filed Dec. 6, 1901. Clarence Kellogg, clerk of supreme court, Wis.

24 THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, MELVIN A. HOYT. } No. 4192.

W. H. Bennett, district attorney.
W. H. Timlin, attorney for A. J. Aikens.
Van Dyke, Carter & Van Dyke, attorneys for A. Huegin.
N. S. Murphy, attorney for M. A. Hoyt.
Hon. A. C. Brazee, presiding judge.

July 5, 1900.—The original complaint, warrant and all other papers in this case from police court, Milwaukee, received and filed.

July 18, 1900.—All the original papers in this cause sent to the circuit court of Milwaukee county, on a petition of the defendants' counsel for a writ of *habeas corpus.*

July 2, 1901.—All the original papers in this cause returned to the municipal court from the clerk of the circuit court of Milwaukee county.

October 21, 1901.—Came the district attorney for the county of Milwaukee, and in open court filed an information against the above-named defendants, endorsed: State of Wisconsin, municipal court, Milwaukee county, ss. I hereby certify that on the 21st day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and produced their bodies in court, Theo. Zillmer, sheriff, per Fred Stark, deputy sheriff, fees, etc. Same day defendants severally present in court, whereupon the said defendants were arraigned in open court. Reading of the information waived by the defendants severally. And the said defendants, Andrew J. Aikens and Albert Huegin, each for himself filing a special plea in bar; and the said defendant Melvin A. Hoyt, entering and filing a demurrer to the information.

25 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN }
vs.
ALBERT HUEGIN ET AL. }

The judge of the above-mentioned court, having been at the time of the instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20, 1901, at ten o'clock a. m., as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court, before the said circuit judge, the Hon. Geo. W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m. of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing, notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court.

A. C. BRAZEE, *Judge.*

Milwaukee, November 11, 1901.

November 20, 1901.—Defendants with their attorneys all present in open court. Hon. Geo. W. Burnell, presiding judge. Motions of pleas before made argued by counsel and submitted, court ordered that the motion to strike out the plea of the defendants Huegin

and Aikens be considered a demurrer, upon application of the district attorney and the defendants' counsel, the defendants' counsel consenting. Court further ordered that the demurrer of the State as to the defendants Huegin and Aikens be sustained, the defendants declining to plead over and stand upon their plea. The demurrer of the defendant Hoyt overruled by the court, and the defendant declines to plead over and stands upon his plea. Recess taken until 2 o'clock p. m. Two o'clock p. m. defendants with their attorneys all present in open court.

Cause submitted. Whereupon court called upon the de-
26 fendants, each of them, to give any reason they might have, why sentence should not be pronounced upon them, and they giving no reason, court did upon the findings and pleadings in this cause, find the said defendants severally guilty as charged in the information aforesaid and did adjudge and determine that the defendants Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, severally, and each of you, pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{10}{100}$ dollars, costs, each, or in default of the payment of said fine and costs to be committed to the House of Correction of Milwaukee county at hard labor until said fine and costs are paid, but such imprisonment shall not exceed in all thirty days each. And now comes the defendants severally, by their attorneys and files exceptions to the judgment of the court. Exceptions allowed by the court.

And now comes the defendants, severally and each of them, by their attorney, and ask for a stay of proceedings in this cause pending the defendants' appeal to the supreme court. Stay granted by the court, and pending the stay of proceedings court ordered that the defendants recognize in the sum of five hundred dollars each. Bail given.

Fines,	$450.00
Costs,	201.31
Total,	$651.31

Nov. 26, 1901.—Writ of error as to all of the defendants in above cause from the Hon. John B. Cassoday, chief justice of the State of Wisconsin, filed. Bill of exceptions as to all of the above-named defendants filed. Notice of filing writ of error from defendants' attorneys filed.

27 STATE OF WISCONSIN, }
Municipal Court, Milwaukee County, } ss:

I, Frank E. Woller, clerk of the municipal court, do hereby certify that I have compared the foregoing copy with the original record entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, this fourth day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

28 *Capias.*

STATE OF WISCONSIN,
Municipal Court for the City and County of Milwaukee, } ss:

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

We command you, that you take Albert Huegin And. J. Aikens and Melvin A. Hoyt and them safely keep, so that you may have their bodies before the municipal court of the county of [SEAL.] Milwaukee aforesaid, at the court-room in Milwaukee, forthwith then and there to answer unto an information pending against them in said court for conspiracy to injure which shall then and there be made to appear, and of this writ make due return.

Witness, the Hon. A. C. Brazee, judge of the municipal court of said county and city at Milwaukee, the 21st day of October in the year of our Lord one thousand nine hundred and one.

FRANK E. WOLLER,
Clerk of the Municipal Court,
By THOS. V. DALLY, *Deputy.*

——— ———, *Attorneys.*

(Endorsements.)

STATE OF WISCONSIN,
Municipal Court, Milwaukee County, } ss:

I hereby certify that on the twenty-first (21st) day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, And. J. Aikens and Melvin A. Hoyt, and produced their bodies in court.

Fees.

Service	$2.00
Travel	.20
Attendance	4.50
Return	.25
Total	$6.95

THEODORE ZILLMER, *Sheriff,*
Per FRED STARK, *Dep. Sheriff.*

No. 4192. October term, A. D. 1901. Municipal court, Milwaukee county. The State of Wisconsin *v.* Albert Huegin *et al.* Capias. Docket No. 2289. Theo. Zillmer, sheriff. Filed Oct. 21, 1901. Frank E. Woller, clerk municipal court.

29 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

I, W. H. Bennett, district attorney for Milwaukee county, hereby inform the court that on the 5th day of April, in the year one thousand nine hundred, at the city of Milwaukee, and within said county of Milwaukee, Wisconsin, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did, then and there, unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business and for the purpose and with the intent then and there of wilfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said, The Journal Company, at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subse-
30 quently thereto, the said The Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of said The Milwaukee Journal and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

That the prices for advertisements and the advertising rates which

newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900 said The Journal Company in good faith, established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

That at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee having an extensive circulation and devoted to the purposes of a general newspaper and to advertise for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and de-
31 voted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

That on or about the 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant-, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously and unlawfully injuring said The Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about 25 per cent. in excess of what said last-mentioned three

papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was
32 and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said last three mentioned newspapers because such merchant or other persons so prevented had paid or agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Wisconsin.

Dated at Milwaukee, in said county, this seventh day of October, in the year one thousand nine hundred and one.

W. H. BENNETT,
District Attorney, Milwaukee County, Wis.

(Endorsements.)

Prisoners arraigned in open court this 21st day of October, 1901, and the said defendants Andrew J. Aikens and Albert Huegin each for himself filing a special plea in bar, and the said defendant Melvin A. Hoyt entering and filing a demurrer to the information.

A. C. BRAZEE,
Municipal Judge.

Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Information for conspiracy. W. H. Bennett, district attorney. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

33 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Andrew J. Aikens in his own proper person cometh into court and having heard the information read, pleads thereto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred the Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April, A. D. one thousand nine hundred and subsequently thereto, the said The Journal Company, had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company, was and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholders in said The Journal Company and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things that of editor of said The Milwaukee

34

Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

And further, that the prices for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other said newspapers.

And further, that on or about the fifth day of April, A. D. one thousand nine hundred, the *said* Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other

three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five per centum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of said combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were
36 pursuant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that pursuant to said combination, agreement and confederation and in furtherance thereof the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant or other persons so prevented had paid or agreed to pay to said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the herein-

before-mentioned acts, intentions and agreements and combinations were done, harbored, made and entered into in trade competition and that such hereinbefore-mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants, the said Albert Huegin and Melvin A. Hoyt, was, during all said times last mentioned and now is, a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of his said
37 codefendants was engaged at the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than the Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company or any stockholder thereof in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore, the said Andrew J. Aikens prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, etc.

ANDREW J. AIKENS.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens being duly sworn, says he has signed the foregoing plea and knows its contents and that the same is true.

ANDREW J. AIKENS.

Subscribed and sworn to before me, October 21, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

W. H. TIMLIN,
Attorney and Counselor at Law.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* A. J. Aikens *et al.* A. J. Aikens. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

38 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The judge of the above-mentioned court having been at the time of instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20th, 1901, at ten o'clock a. m., as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court, before the said circuit judge, the Hon. George W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m., of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court,

A. C. BRAZEE, *Judge.*

Milwaukee, November 11th, 1901.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Order setting case for trial. Filed Nov. 11, 1901. Frank E. Woller, clerk of municipal court.

39 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and Van Dyke, Van Dyke & Carter, his attorneys; to Andrew J. Aikens and Timlin, Glicksman & Conway, his attorneys, and to Melvin A. Hoyt and N. S. Murphy, his attorney:

Please take notice, that Hon. George W. Burnell, circuit judge of the third judicial circuit, who was heretofore called by Hon. A. C. Brazee, judge of the municipal court, has consented to attend and hold court during the trial of the above cause; and you, and each of you, are hereby notified that the above cause has been set for trial before said circuit judge, the Hon. George W. Burnell, Wednesday, November 20, 1901, at ten o'clock a. m. of said day, at the municipal court room, in the city hall of the city of Milwaukee, county of Milwaukee, Wisconsin.

By order of the court.

FRANK E. WOLLER,
Clerk of the Municipal Court.

Dated this 11th day of November, 1901.

(Endorsements.)

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 12th day of November, 1901, I served the within notice on the within named Albert Huegin, one of the defendants, on Van Dyke, Van Dyke & Carter, his attorneys; on Andrew J. Aikens, one of the defendants, on Timlin, Glicksman & Conway, his attorneys; and on Melvin A. Hoyt, one of the defendants; and on N. S. Murphy, his attorney, personally, by delivering to and leaving with each of them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on each copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$3.50
Copies	2.10
Travel	.20
Ret.	.25
	$6.05

Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* Notice of time of hearing. Filed Nov. 18, 1901. Frank E. Woller, clerk of municipal court. Docket No. 2490. Theodore Zillmer, sheriff.

40 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Andrew J. Aikens, and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1901.

41 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the

plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn, on oath, deposes and says that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
42 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2518. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Andrew J. Aikens, personally, by delivering to and leaving with him a true copy thereof.

I further certify, that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff.*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.35
	$2.35

43 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Andrew J. Aikens and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1901.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Timlin, Glicksman & Conway personally by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date thereon, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
By Z. CLAYTON, *Deputy.*

Service	1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

44 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says that he is the district attorney in and for the county of Milwaukee that he has heard read the for-going petition and knows the
45 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Docket No. 2521. Theodor Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court. W. H. Bennett, district attorney.

46 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

This cause coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. B[illegible]ell, judge presiding, he having been called in by Judge A. C. [illegible]zee, who had heretofore acted for the State in this matter; and the defendant, Andrew J. Aikens, having filed and served a special plea in bar, and the district attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Andrew J. Aikens then and there duly excepted, said exception is hereby allowed and signed, and the said Andrew J. Aikens thereupon declared in open court that he stood upon said plea, and the court thereupon found Andrew J. Aikens guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67.10 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Andrew J. Aikens be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Andrew J. Aikens duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Andrew J. Aikens asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Andrew J. Aikens recognize to the State of Wisconsin in the sum of five hundred dollars, with sufficient sureties for his
47 personal appearance at the supreme court at the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEORGE W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. W. H. Timlin, attorney for Andrew J. Aikens. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

48 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, of the county of Milwaukee, acknowledge ourselves to be indebted to

the State of Wisconsin in the sum of $500.00 *dollars*, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Andrew J. Aikens was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of 150.00 dollars, and costs taxed at 67.10 dollars, and to be committed to the House of Correction of said county until such fine and costs are paid or discharged, such imprisonment not to exceed 30 days; and whereas, the said Andrew J. Aikens has presented exceptions under section 7220 R. S. which were allowed, preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin; now, therefore, if the said Andrew J. Aikens shall personally appear in the supreme court of the State of Wisconsin on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

49 (Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against A. J. Aikens. Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20th, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

50 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter was disqualified having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid, Andrew J. Aikens, appeared by W. H. Timlin, his attorney, and the following proceedings were had; Said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Andrew J. Aikens, and after hearing the said district attorney for said motion and the said W. H. Timlin, opposed, said motion was denied; whereupon the said district attorney asked that his motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said W. H. Timlin in behalf of the accused defendant Andrew J. Aikens, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Andrew J. Aikens then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Andrew J. Aikens declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{10}{100}$ (67.10) dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Andrew J. Aikens then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed, and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Andrew J. Aikens in the cause aforesaid.

Dated November 25, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff *v.* Andrew J. Aikens, defendant. Bill of exceptions. W. H. Timlin, 105 Grand Av., Milwaukee, defendant's attorney. Due service admitted this 25th day of November, 1901. W. H. Bennett, dist. att'y and attorney for plaintiff, State of Wis-

consin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

51 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Andrew J. Aikens, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc.,
W. H. TIMLIN,
Attorney for A. J. Aikens, Defendant.

52 STATE OF WISCONSIN, *Supreme Court,* } *ss:*

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor manifest error hath intervened to the great damage of the said Andrew J. Aikens, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the
[SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

53 Municipal court, Milwaukee county. State of Wisconsin, plaintiff *v.* Andrew J. Aikens *et al.*, defendants. Notice of filing writ of error. W. H. Timlin, 105 Grand Av., Milwaukee, A. J. Aikens' attorney. Due service admitted this 26th day of November, 1901. W. H. Bennett, dist. att'y & attorney for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

54 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Albert Huegin in his own proper person cometh into court and having heard the information read, pleads thereunto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred the Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April A. D. one thousand nine hundred and subsequently thereto, the said The Journal Company, had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company, was
55 and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholdres in said The Journal Company and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is among other things that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

And further, that the price for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal

and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a
56 general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other of said newspapers.

And further, that on or about the fifth day of April, A. D. one thousand nine hundred, the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit, said The Milwaukee Sentinel, the Evening Wisconsin and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of
57 them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respec-

ively, to wit, about twenty-five per centum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of such combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were pursuant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that

58 pursuant to said combination, agreement and confederation and in furtherance thereof the said Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant-, or other persons so prevented had paid or agreed to pay to said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the hereinbefore-mentioned acts, intentions and agreements and combinations were done, harbored, made and entered into in trade competition, and that such hereinbefore-mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants the said Andrew J. Aikens and Melvin A. Hoyt was during all said times last mentioned and now is a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of his said codefendants was engaged at the city of Milwaukee in the
59 county of Milwaukee in the State of Wisconsin in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than the Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company, or any stockholder thereof, in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore the said Albert Huegin prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, &c.

ALBERT HUEGIN.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Albert Huegin, being duly sworn, says he has signed the foregoing plea and knows its contents and that the same is true.

ALBERT HUEGIN.

Subscribed and sworn to before me, October 21st, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1st, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

GEO. D. VAN DYKE,
Attorney and Counselor at Law.

60 (Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* A. Huegin *et al.* A. Huegin. Filed Oct. 21,
1901. Frank E. Woller, clerk of municipal court.

61 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin, and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 14th day of November, A. D. 1901.

62 (Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in the said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Albert Huegin, personally, by delivering to and leaving with him a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name, and official title on the copy so served.

THEODORE ZILLMER, *Sheriff*,
Per Z. CLAYTON, *Deputy*.

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

63 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huegin, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huegin, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huegin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in this behalf on the part of said defendant, Albert Huegin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huegin be stricken out and that the said defendant, Albert Huegin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, }
Milwaukee County, } *ss:*

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
64 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2519. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

65 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon thereafter as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 14th day of November, A. D. 1901.

66 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huegin, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huegin, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huegin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in this behalf on the part of said defendant, Albert Huegin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huegin be stricken out and that the said defendant, Albert Huegin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
67 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Van Dyke, Van Dyke & Carter, personally, by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2520. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

68 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Albert Huegin, having filed and served a special plea in bar, and the dis-

trict attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Albert Huegin then and there duly excepted, said exception is hereby allowed and signed, and the said Albert Huegin thereupon declared in open court that he stood upon said plea, and the court thereupon found Albert Huegin guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67.10 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Albert Huegin be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Albert Huegin duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Albert Huegin asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Albert Huegin recognize to the State of Wisconsin in the sum of $500 *dollars*, with sufficient sure-

69 ties for his personal appearance at the supreme court at the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. Geo. D. Van Dyke, attorney for Albert Huegin. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

70 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Albert Huegin, and J. H. Puelicher and Herman Bleyer, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Albert Huegin was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure, and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at sixty-seven and $\frac{10}{100}$ dollars, aggregating $217.10, and to be committed to the House of Correction of said county, until such fine and costs are paid or dis-

charged, such imprisonment not to exceed 30 days; and whereas, the said Albert Huegin has presented exceptions which were allowed and signed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin.

Now, therefore, if the said Albert Huegin shall personally appear in said supreme court on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

ALBERT HUEGIN.
HERMAN BLEYER.
J. H. PUELICHER.

71 STATE OF WISCONSIN, } ss:
Milwaukee County, }

J. H. Puelicher and Herman Bleyer, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

J. H. PUELICHER.
HERMAN BLEYER.

Subscribed and sworn to before me this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.
FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Albert Huegin. Recognizance for appeal. Approved as to form and sufficiency of sureties this 20th day of November, 1901. George W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

72 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff, }
vs.
ALBERT HUEGIN ET AL., Defendant. }

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter

was disqualified, having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid, Albert Huegin, appeared by George D. Van Dyke, his attorney, and the following proceedings were had; said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Albert Huegin and after hearing the said district attorney for said motion and the said Albert Huegin opposed said motion was denied; whereupon the said district attorney asked that his said motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said Geo. D. Van Dyke in behalf of the accused defendant Albert Huegin, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Albert Huegin then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Albert Huegin declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty seven and 10/100 dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment to be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Albert Huegin then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause, the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Albert Huegin in the cause aforesaid.

Dated November 25, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff, *v.* Albert Huegin, defendant. Bill of exceptions. Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin, attorneys for defendant, Albert Huegin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

73 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Albert Huegin, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc.,
GEO. D. VAN DYKE,
Attorney for Albert Huegin, Defendant.

74 STATE OF WISCONSIN, *Supreme Court,* } *ss:*

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor manifest error hath intervened to the great damage of the said Albert Huegin, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

[SEAL.]

Attest: CLARENCE KELLOGG, *Clerk.*

75 (Endorsements:) Municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* A. J. Aikens *et al.*, defendants. Notice of filing writ of error. Due service of the within

notice admitted this 26th day of November, A. D. 1901. W. H. Bennett, district att'y and att'y for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

76 STATE OF WISCONSIN:

Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT, ANDREW J. AIKENS, and ALBERT HUEGIN, Defendants.

And the said Melvin A. Hoyt separately and in his own proper person, cometh into court here, and having heard the information read, saith that the said information, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and in addition thereto this defendant alleges, the following special objections to the said information, to wit:

(1.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the other defendants named in the said information, were such conspiracies, combinations, confederations, associations, agreements and understandings as this defendant and the said other defendants had a lawful right to make and enter into as forming a part of their legitimate trade and competition between the said defendants with the said Journal Company and its officers and stockholders in the lawful conduct of the business of this defendant and the said other defendants as publishers of the newspapers respectively conducted by the said defendants, and the said Journal Company.

(2.) That the several acts charged in the said information as having been performed by this defendant and the said other defendants, do not state any criminal offense known to the law, but such acts, and each and every of them, were lawful and legitimate acts of competition in trade such as this defendant and said other defendants had lawful right to perform in the law.

(3.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understand-
77 ings had between this defendant and the said other defendants Andrew J. Aikens and Albert Huegin, were such conspiracies, combinations, associations, agreements and mutual understandings as this defendant and the said other defendants, as citizens of the United States and the State of Wisconsin, had lawful right to make and enter into in the conduct and management of the said several newspapers so published by this defendant and the said other defendants, Andrew J. Aikens and the said Albert Huegin respectively, under the Constitution and laws of the United States, and especially under and by virtue of the provisions of article XIV. of the amend-

ments to the Constitution of the United States, and this defendant claims the protection thereof.

(4.) That the several acts charged therein, as having been done and performed by this defendant and the said other defendants, Andrew J. Aikens and Albert Huegin, in furtherance of the said alleged several conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the said other defendants, were severally and respectively such acts as this defendant and the said other defendants had lawful right to do and perform as citizens of the United States and the State of Wisconsin, as lawful and legitimate conspiracies, combinations, confederations, associations, agreements and mutual understandings, in the conduct of the business of this defendant and the publications of his said newspaper, and that of the newspapers of said other defendants, and in the publication of the said newspapers published by them respectively, and that such acts were innocent acts and lawful acts of competition in the trade and business of this defendant and in the trade and business of the said other defendants, under the Constitution and laws of the United States and especially under the provisions of article XIV. of the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(5.) And because the said information does not state any fact or facts which constitute a criminal offense known to the laws of the State of Wisconsin, but the acts so charged were and are legitimate acts of trade and competition such as any citizen of said State might lawfully employ in the conduct of his business; and this he is ready to verify.

Wherefore, for want of a sufficient information in this behalf, the said Melvin A. Hoyt prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said information specified.

NEWTON S. MURPHEY,
Attorney for Melvin A. Hoyt, One of the Defendants.

(Endorsements:) State of Wisconsin, municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* Melvin A. Hoyt, Andrew J. Aikens and Albert Huegin, defendants. Demurrer of def't Hoyt. Filed Oct. 21st, 1901. Frank E. Woller, clerk of municipal court. N. S. Murphey, att'y for def't Hoyt.

78 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Melvin A. Hoyt,

having filed and served a demurrer to the information filed herein, and the court having overruled said demurrer, to which ruling the said Melvin A. Hoyt then and there duly excepted, said exception is hereby allowed, and the said Melvin A. Hoyt thereupon declared in open court that he stood upon said demurrer, and the court thereupon found said Melvin A. Hoyt guilty as charged in the information, and sentenced him to pay a fine of one hundred and fifty dollars together with $67.10, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Melvin A. Hoyt be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Melvin A. Hoyt duly excepted, and the exception is hereby allowed. And thereupon, the said Melvin A. Hoyt asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Melvin A. Hoyt recognize to the State of Wisconsin in the sum of $500.00, with sufficient sureties for his personal appearance at the supreme court at
79 the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Melvin A. Hoyt *et al.* Exceptions. N. S. Murphey, attorney for Melvin A. Hoyt. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

80 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Melvin A. Hoyt, Frederick Seibel and George Brumder, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Melvin A. Hoyt was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at sixty-seven and $\frac{10}{100}$ dollars, and to be committed to the House of Correction of said county, until such fine and costs are paid or discharged, such imprisonment

not to exceed thirty days; and whereas, the said Melvin A. Hoyt has presented exceptions under R. S. section 7220 which were allowed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin;

Now, therefore, if the said Melvin A. Hoyt shall personally appear in said supreme court of the State of Wisconsin, on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and *to* enter and prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

MELVIN A. HOYT.
FRITZ SEIBEL.
GEO. BRUMDER.

81 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Fred Seibel and Geo. Brumder, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

FRITZ SEIBEL.
GEO. BRUMDER.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Melvin A. Hoyt *et al.* Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

82 STATE OF WISCONSIN:

Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff, }
vs.
MELVIN A. HOYT ET AL., Defendants. }

At a regular term of said court holden on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having

been called in by Judge A. C. Brazee for the reason that the latter judge was disqualified to try said cause, having heretofore acted for the said State in this matter, as district attorney for the county of Milwaukee, the State of Wisconsin appearing by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant Melvin A. Hoyt aforesaid appearing by Newton S. Murphey, his attorney, and the following proceedings were had: The said cause coming on to be heard upon the demurrer heretofore filed by the said defendant Melvin A. Hoyt to the information filed herein by said district attorney, and after hearing the said district attorney for the State in opposition to the said demurrer, and the defendant Melvin A. Hoyt by his said attorney in support thereof, and the court being advised in the premises, whereupon the court ordered that the said demurrer of the said defendant Melvin A. Hoyt be and the same was thereby overruled, to which ruling the said defendant Melvin A. Hoyt then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Melvin A. Hoyt declared that he stood upon said demurrer and did not desire to plead over. The court thereupon found the said defendant Melvin A. Hoyt guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty-seven and $\frac{10}{100}$ dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said defendant Melvin A. Hoyt then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Melvin A. Hoyt in the cause aforesaid.

Dated November 23, A. D. 1901.

GEORGE W. BURNELL, [SEAL.]
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin plaintiff *v.* Melvin A. Hoyt *et al.*, defendants. Bill of exceptions. We consent that Judge Burnell may sign and seal within as bill of exceptions in above cause. Nov. 22, 1901. W. H. Bennett, dist. att'y Mil. Co., Wis. Newton S. Murphy, att'y for def't. Melvin A. Hoyt. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Newton S. Murphey, att'y for def't Melvin A. Hoyt.

83 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that I have compared the foregoing copies with the original capias, information for conspiracy, plea of A. J.

Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens, plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing writ of error of defendant, Albert Huegin; demurrer of defendant Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court this 4th day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

84 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that pursuant to the command of the annexed writ of error, I herewith transmit to the supreme court of the State of Wisconsin, certified copies of all of the original papers filed in the therein-entitled action, together with a certified copy of the original record entered in said action, and I further certify that the foregoing are certified copies of all said original papers, being the original capias, information for conspiracy, plea of A. J. Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens; plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing writ of error of defendant, Albert Huegin; demurrer of defendant, Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant, Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, filed and entered in the action therein entitled and of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court this 4th day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

85 And afterwards, to wit: on the first day of February, A. D. 1902, the same being the thirteenth day of said term, the following proceedings were had in this court, in said cause, that is to say:

Milwaukee Municipal Court.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

And now at this day came the parties herein by their attorneys and submitted this cause to the court on case and briefs, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

86 And afterwards, to wit: on the eighteenth day of February, A. D. 1902, the same being the fourteenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Milwaukee Municipal Court.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Opinion by Justice Marshall.

This cause came on to be heard on the return to the writ of error issued herein, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the municipal court of Milwaukee county, in this cause, be and the same is hereby affirmed, with costs against the said plaintiff in error taxed at the sum of — dollars.

Justice Dodge took no part.

87 And thereupon, this court, by Justice Marshall, filed its opinion in said cause, in the words and figures following, that is to say:

STATE OF WISCONSIN:

In Supreme Court.

Nos. 7, 8 and 9, State.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Each of the plaintiffs in error sued out his proper writ to review a judgment of the municipal court of Milwaukee county, adjudging him guilty of having committed an offense by violating section 4466*a* R. S. 1898, as charged in the information. The sufficiency of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4466*a* *id.*, were considered by this court and sustained on a review of *habeas*
88 *corpus* proceedings on writs of error, the causes being reported in 110 Wis. p. 189. On such review there was no question but that the complaint fully satisfied the statute. It was challenged, and the statute as well, on constitutional grounds. After such decision the causes were remanded for further proceedings according to law, whereupon an information was duly filed, charging the accused persons in all respects substantially as in the complaint, which has been passed upon as aforesaid.

Upon being duly arraigned upon such information, Andrew J. Aikens and Albert Huegin separately filed pleas admitting the charge made against them, but insisting that the same did not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute a punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information, and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis. 189. The trial court followed that decision as it was bound to do. As we understand the matter the information contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect pleaded guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

89

By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

90 ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above-entitled cause.

That the original writ of error, the petition therefor, the citation with its service endorsed thereon, the assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this 7th day of April, 1902.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 18,486. Wisconsin Supreme Court. Term No. 298 Albert Huegin, plaintiff in error, *vs.* The State of Wisconsin. Filed April 11", 1902.

(18,487.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 299.

MELVIN A. HOYT, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	3	2
Petition for writ of error	4	2
Order allowing writ of error	9	5
Case on writ of error to municipal court of Milwaukee county, attached to petition for writ of error	10	6
Statement	13	6
Record entries	14	7
Clerk's certificate to record entries	16	9
Certificate of arrest	17	9
Information	18	10
Demurrer	24	14
Bill of exceptions	26	16
Opinion of supreme court of Wisconsin, attached to petition for writ of error	29	18
Citation and service	31	19
Bond on writ of error	32	19
Assignment of errors	35	21
Caption	39	22
Record from municipal court	40	22
Bond on writ of error	40	22
Writ of error	41	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1902.

	Original.	Print
Record entries	42	3
Capias	46	3
Information	47	3
Plea of Andrew J. Aikens	51	3
Order setting cause for trial	56	3
Notice of trial	57	3
Notice of motion to strike out plea of Aikens	58	3
Motion to strike out plea of Aikens	59	3
Notice of motion to strike out plea of Aiken	61	3
Motion to strike out plea of Aikens	62	4
Bill of exceptions of Aikens	64	4
Recognizance of Aikens	66	4
Bill of exceptions of Aikens	68	4
Notice of appeal of Aikens	69	4
Writ of error	70	4
Plea of Albert Huegin	72	4
Motion to strike out plea of Huegin	81	5
Notice of motion to strike out plea of Huegin	83	5
Motion to strike out plea of Huegin	84	5
Bill of exceptions of Huegin	86	5
Recognizance of Huegin	88	5
Bill of exceptions of Huegin	90	5
Notice of appeal of Huegin	91½	5
Writ of error	92	5
Demurrer of Melvin A. Hoyt	94	5
Bill of exceptions of Hoyt	97	5
Recognizance of Hoyt	99	5
Bill of exceptions of Hoyt	101	6
Clerk's certificate to record	103	6
Return to writ of error	104	6
Clerk's certificate to correction in record	105	6
Order taking cause under advisement	106	6
Judgment	107	6
Stipulation to correct record	108	6
Opinion	111	6
Clerk's certificate	114	6
Assignment of errors	115	6

1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Wisconsin before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Wisconsin, defendant in error against Melvin A. Hoyt plaintiff in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
2 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Melvin A. Hoyt plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 11th day of March, in the year of our Lord one thousand nine hundred and two.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the Circuit Court of the United States
for the Western District of Wisconsin,
By F. D. REED, *Deputy.*

Allowed by

——— ———,
Associate Justice of the Supreme
Court of the United States.

3 [Endorsed:] State of Wisconsin supreme court State of Wisconsin def't in error v. Melvin A. Hoyt pl'ff in error. Petition for writ of error, allowance, citation, and writ of error. Filed Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

STATE OF WISCONSIN, } ss:
Supreme Court, }

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

4 STATE OF WISCONSIN:

Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGEN, and MELVIN A. HOYT, Plaintiffs in Error.

To Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin:

The petition of Melvin A. Hoyt, one of the plaintiffs in error, in his own right and behalf respectfully represents that he is a citizen of the State of Wisconsin and of the United States and a resident of the city of Milwaukee in said State, and is there engaged and has been for more than five (5) years last past, in the publication of a daily newspaper called the Milwaukee Daily News. That during the period last aforesaid, the above-named plaintiff in error Andrew J. Aikens was engaged in the publication of another daily newspaper at the city of Milwaukee in said State called the Evening Wisconsin; and during the same period the above-named Albert Huegen was engaged in the publication of another daily newspaper called The Milwaukee Sentinel, both said Aikens and the said Huegen being at all times citizens of the State of Wisconsin and of the United States, residing at the city of Milwaukee, where each and all of the said three papers had been and were then being published by the said plaintiffs in error respectively. That on the 7th day of October A. D. 1901 in the municipal court of Milwaukee county in the said State of Wisconsin, being a court of criminal jurisdiction for said county, an information against the above-named plaintiffs in error was filed by the district attorney of the county of Milwaukee in said State, in pursuance whereof warrants
5 were issued and served upon the said plaintiffs in error respectively, who thereafter, on the date last aforesaid appeared in the said municipal court in pursuance of the filing of such information and the issuing of said warrants. That thereafter on November 11th A. D. 1901, being the day to which the hearing upon said information had been adjourned, your petitioner appeared in

the said municipal court and filed a demurrer to the said information in the office of the clerk of said municipal court, copies of the said information, warrants and return thereon, and of the said demurrer interposed to the said information by your petitioner, being hereto annexed and forming a part of this petition. That thereafter on the 20th day of November A. D. 1901 the day to which said cause had been further adjourned by said municipal court, your petitioner again appeared before the said court in person and by his counsel, and the said State of Wisconsin by the said district attorney of Milwaukee county, when the said demurrer to the said information was argued before the said municipal court and the said demurrer was then and there overruled by the said court; and thereupon your petitioner tendered his exceptions to the said order which said exceptions were reduced to writing and allowed by the court. Whereupon your petitioner then and there signified to the court, that he stood upon his said demurrer and did not desire to plead over. That thereupon the said municipal court found your petitioner guilty as charged in the information, and sentenced him to pay a fine of $150.00 together with 67 and 10/100 dollars' costs, being one-third of the whole costs of said proceedings, and further adjudged that in default of such payment your petitioner be committed to the House of Correction for Milwaukee county until such fine and costs were paid, not, however, in all exceeding 30 days. That thereupon your petitioner, the said Melvin A. Hoyt, then and there duly tendered his exceptions to said findings and judgment of conviction, which exceptions were reduced to writing and allowed; and in order
6 that said proceedings might more certainly appear of record in this cause, the judge of said municipal court did on the 23rd day of November A. D. 1901 by the consent of the said district attorney and your petitioner, sign, seal and certify a bill of exceptions on the part of your petitioner in the cause aforesaid, which said order overruling said demurrer and the exceptions thereto, and the filing of the same in said municipal court and the findings of said court that your petitioner was guilty as charged in the information together with the sentence aforesaid and the judgment of said court thereupon as above set forth, and the exceptions thereto, more clearly appear in the record of the said cause hereto attached and made a part of this petition. That thereupon your petitioner, for the purpose of staying proceedings upon the said judgment aforesaid to wit on the 25th day of November A. D. 1901 duly executed a bond to the State of Wisconsin in the sum of two hundred and fifty (250) dollars, being the sum fixed by said court for that purpose, with two surities and conditioned as required by law, and by the said court, which said bond was on that day duly approved by the judge of the said municipal court and filed in the office of the clerk of the supreme court of the State of Wisconsin on the 26th day of November A. D. 1901, whereby all proceedings in the said cause against your petitioner were stayed until the return of the remittitur from the supreme court of the State of Wisconsin to the municipal court of the county of Milwaukee. That thereafter a writ of error was duly

issued by the supreme court of the State of Wisconsin in the said cause against your petitioner, returnable before said court on the Tuesday before the second Wednesday of January A. D. 1902, and the record in said cause against your petitioner was duly certified and returned by the said municipal court in pursuance of said writ of error to the said supreme court of the State of Wisconsin, prior to the date last aforesaid, and the said cause was duly placed
7 upon the January term calendar of said supreme court of the State of Wisconsin for the year A. D. 1902 for argument and decision by said court. That afterwards on the 1st day of February A. D. 1902 the said State of Wisconsin appearing in the said supreme court by its attorney general, and this petitioner by his counsel, by mutual agreement of the parties, submitted the said cause against your petitioner to the said supreme court for decision, without brief or argument on behalf of the State of Wisconsin, and, upon the joint brief in behalf of your petitioner and the said other plaintiffs in error above named, for decision and final disposition by the said supreme court of the State of Wisconsin.

And your petitioner further alleges that afterwards on the 18th day of February 1902 the said supreme court of the State of Wisconsin decided the said cause removed to it, in favor of the said State of Wisconsin, and against your petitioner, in all respects affirming the rulings, decisions and judgment of the municipal court of Milwaukee county, filing a written opinion therein, a copy whereof is hereto annexed and made a part of this petition. And your petitioner further alleges that the said supreme court of the State of Wisconsin, as he is advised and submits, erred in its judgment in affirming the judgment so removed by said writ of error and thereby deprived your petitioner of his rights, privileges and immunities as a citizen of the State of Wisconsin and of the United States, secured to him in the law. That in the proceedings and hearing of the cause of your petitioner in the supreme court of the State of Wisconsin, there was necessarily drawn in question the validity of a certain statute of the State of Wisconsin as being repugnant to the Constitution of the United States, but which was nevertheless adjudged by the said supreme court of Wisconsin to be a valid statute; that the following is the statute of the State of Wisconsin, being sec. 4466*a* of Sanborn & Berryman's Annotated Statutes of the State of Wisconsin for the Year A. D. 1898:—

8 "Boycotting, strikes, and lockouts."

"Injury to business; restraint of will.

"SECTION 4466*a*. Any two or more persons who shall combine, "associate, agree, mutually undertake or concert together for the "purpose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatsoever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another from "doing or performing any lawful act shall be punished by imprison-

"ment in the county jail not more than one year or by fine not ex-
"ceeding five hundred dollars."

And your petitioner further avers, that, as he is advised and submits to your honor, that in the decision of the said cause against your petitioner on the 18th day of February A. D. 1902, by the said supreme court of the State of Wisconsin, there was necessarily drawn in question the construction of article XIV of the amendments to the Constitution of the United States, and that such decision of the supreme court of Wisconsin was adverse to said XIV amendment, and the rights of your petitioner thereunder, and in its effect deprived your petitioner of the rights, privileges and immunities secured by the said article XIV of the amendments to the Constitution of the United States, and of the liberty property and due process of law secured to your petitioner by the said article XIV.

And your petitioner hereby offers such security on granting a writ of error, hereinafter prayed, as your honor may require, to the effect, that he will prosecute his writ of error to effect, and, if he fail to make good his plea, shall answer all damages and costs, and prays that the said security shall be taken as a supersedeas and stay of execution upon the judgment returned in said cause.

Wherefore your petitioner prays your honor to grant and allow to him a writ of error from the judgment of the said supreme court of the State of Wisconsin to be issued by the Supreme Court of the United States to the said supreme court of the State of Wis-
9 consin, to the end that the judgment of said supreme court of the State of Wisconsin may be reviewed by the Supreme Court of the United States, and the rights, privileges and immunities secured by the said article XIV of the amendments to the Constitution of the United States and the liberty, property and due process of law thereby secured to your petitioner, may be adjudged and awarded to him, and for such further or other order as may be proper.

MELVIN A. HOYT, *Petitioner.*

UNITED STATES OF AMERICA, } ss:
State of Wisconsin, }

Desiring to give petitioner Melvin A. Hoyt an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the same be made a supersedeas, the bond, in the penal sum of one thousand dollars, herewith presented, being approved.

In testimony witness my hand this 11th day of March A. D. 1902.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis.

10 STATE OF WISCONSIN:

In Supreme Court.

THE STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Plaintiffs in Error.

Writ of error to municipal court, Milwaukee county.

Case.

Newton S. Murphey, counsel for plaintiff in error, Melvin A. Hoyt.

11 In the Supreme Court of the State of Wisconsin, January Term, A. D. 1902.

THE STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. Hoyt, Plaintiffs in Error. } State, No. —.

Newton S. Murphey, counsel for plaintiff in Error, Melvin A. Hoyt.
W. H. Bennett, counsel for defendant in error.

Writ of error to the municipal court of Milwaukee county, State of Wisconsin.

12 *Index.*

Bill of exceptions of defendant Melvin A. Hoyt..... 21
Capias 9
Certificate of clerk to record 9
Certificate of clerk to transcript 23
Information 11
Demurrer by defendant Hoyt 19
Judgment of court 21
Recognizance of defendant Hoyt 21
Record of municipal court..... 7
Return of clerk to writ of error 23

13 *Statement.*

This writ of error was sued out to review the judgment of the municipal court of Milwaukee county, Hon. Geo. W. Burnell, presiding, bearing date November 20, 1901, finding the plaintiff in error herein, guilty of a misdemeanor; to wit, conspiracy to injure another in his trade or business under § 4466*a* of the Statutes of Wisconsin for 1898, and sentencing him to pay a fine of one hundred and fifty (150) dollars, together with sixty-seven and 14/100

(67.10) dollars costs, and in default of payment of such fine and costs to be committed to the House of Correction for Milwaukee county, until such fine and costs are paid, not however to exceed thirty (30) days.

The record follows:—

14 THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, MELVIN A. HOYT. } No. 4192.

Record.

W. H. Bennett, district attorney.
W. H. Timlin, attorney for A. J. Aikens.
Van Dyke, Carter & Van Dyke, attorneys for A. Huegin.
N. S. Murphey, attorney for M. A. Hoyt.
Hon. A. C. Brazee, presiding judge.

July 5, 1900.—The original complaint, warrant and all other papers in this case from police court, Milwaukee, received and filed.

July 18, 1900.—All the original papers in this cause sent to the circuit court of Milwaukee county, on a petition of the defendant's counsel for a writ of *habeas corpus*.

July 2, 1901.—All the original papers in this cause returned to the municipal court from the clerk of the circuit court of Milwaukee county.

October 21, 1901.—Came the district attorney for the county of Milwaukee, and in open court filed an information against the above-named defendants, endorsed: State of Wisconsin, municipal court, Milwaukee county, *ss:* I hereby certify that on the 21st day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and produced their bodies in court, Theo. Zillmer, sheriff, per Fred Stark, deputy sheriff, fees, etc. Same day defendants severally present in court, whereupon the said defendants were arraigned in open court. Reading of the information waived by the defendants severally. And the said defendants, Andrew J. Aikens and Albert Huegin, each for himself filing a special plea in bar; and the said defendant Melvin A. Hoyt, entering and filing a demurrer to the information.

15 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN ET AL.

The judge of the above-mentioned court, having been at the time of the instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in

regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20, 1901, at 10 o'clock a. m. as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court, before the said circuit judge, the Hon. Geo. W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m. of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing, notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court,

A. C. BRAZEE, *Judge.*

Milwaukee, November 11, 1901.

November 20, 1901.—Defendants with their attorneys all present in open court. Hon. Geo. W. Burnell, presiding judge. Motions of pleas before made argued by counsel and submitted, court ordered that the motion to strike out the plea of the defendants Huegin and Aikens be considered a demurrer, upon application of the district attorney and the defendant's counsel, the defendant's counsel consenting. Court further ordered that the demurrer of the State as to the defendants Huegin and Aikens be sustained, the defendants declining to plead over and stand upon their plea. The demurrer of the defendant Hoyt overruled by the court, and the defendant declines to plead over and stands upon his plea. Recess taken until 2 o'clock p. m. Two o'clock p. m. defendants with their attorneys all present in open court. Cause submitted. Whereupon
16 court called upon the defendants, each of them, to give any reason they might have, why sentence should not be pronounced upon him, and they giving no reason, court did upon the findings and pleadings in this cause, find the said defendants severally guilty as charged in the information aforesaid and did adjudge and determine that the defendants Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, severally, and each of *you*, pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{19}{100}$ dollars, costs, each, or in default of the payment of said fine and costs to be committed to the House of Correction of Milwaukee county until said fine and costs are paid, but such imprisonment shall not exceed in all thirty days each. And now comes the defendants severally, by their attorneys and files exceptions to the judgment of the court. Exceptions allowed by the court.

And now comes the defendants, severally and each of them, by

Fines.....	$450.00
Costs	201.31
Total..	$651.31

their attorney, and ask for a stay of proceedings in this cause pending the defendants' appeal to the supreme court, until the remittitur shall be returned herein from said supreme court. Stay granted by the court, and pending the stay of proceedings court ordered that the defendants recognize in the sum of five hundred dollars each. Bail given.

Nov. 26, 1901.—Writ of error as to all of the defendants in above cause from the Hon. John B. Cassoday, chief justice of the State of Wisconsin, filed. Bill of exceptions as to all of the above-named defendants filed. Notice of filing writ of error from defendants' attorneys filed.

Certificate of clerk of municipal court to foregoing record.

Capias.

Filed Oct. 21, 1901.

STATE OF WISCONSIN, ss:

Municipal Court for the City and County of Milwaukee.

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

We command you, that you take Albert Huegin, And. J. Aikens .....and Melvin A. Hoyt.....and them safely keep, so that you may have their bodies before the municipal [SEAL.] court of the county of Milwaukee aforesaid, at the court-room in Milwaukee, forthwith then and there to answer 17 unto an information pending against them in said court for conspiracy ..... to injure ..... which shall then and there be made to appear, and of this writ make due return.

Witness, the Hon. A. C. Brazee, judge of the municipal court of said county and city at Milwaukee, the 21st day of October in the year of our Lord one thousand nine hundred and one.

FRANK E. WOLLER,
Clerk of the Municipal Court,
By V. DALLY, *Deputy.*

—— ——, *Attorneys.*

STATE OF WISCONSIN, ss:

Municipal Court, Milwaukee County.

I hereby certify that on the twenty-first (21st) day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, And. J. Aikens and Melvin A. Hoyt, and produced their bodies in court.

Fees.

Service	$2.00
Travel	.20
Attendance	4.50
Return	.25
Total	$6.95

Filed Oct. 21, 1901.

THEODORE ZILLMER, *Sheriff*,
Per FRED STARK, *Dep. Sheriff.*

18 *Information for Conspiracy.*

Filed Oct. 21, 1901.

Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Def'a.

I, W. H. Bennett, district attorney for Milwaukee county, hereby inform the court that on the 5th day of April, in the year one thousand nine hundred, at the city of Milwaukee, and within said county of Milwaukee, Wisconsin, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did, then and there, unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business and for the purpose and with the intent then and there of wilfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said, The Journal Company, at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and con-

19 spiracy, and subsequently thereto, the said The Journal Company had a large number of advertisers or patrons who

advertised in said newspaper, the Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of said The Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

That the prices for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900 said The Journal Company in good faith established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

That at all of said times the said Andrew J. Aikens was and now is the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee having an extensive circulation and devoted to the purposes of a general newspaper and to advertise for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was and now is the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

That on or about the 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously and unlawfully injuring said The Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business and to that end and with the purpose and intent aforesaid,

did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about 25 per cent. in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel and The Milwaukee Daily News, and that the right or privilege to advertise in
21 two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did refuse to allow the advertisements of divers merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin or The Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said last three mentioned newspapers because such merchant or other persons so prevented had paid or agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and

agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Wisconsin.

Dated at Milwaukee, in said county, this seventh day of October, in the year one thousand nine hundred and one.

(Signed) W. H. BENNETT,
District Attorney, Milwaukee County, Wis.

Filed Oct. 21, 1901.

Endorsed thereon:

Prisoners arraigned in open court this 21st day of October, 1901, and the said defendants Andrew J. Aikens and Albert Huegin each for himself filing a special plea in bar, and the said defendant Melvin A. Hoyt entering and filing a demurrer to the information.

A. C. BRAZEE,
Municipal Judge.

22 Plea of defendant Andrew J. Aikens.

Filed Oct. 21, 1901.

Order calling in Judge Burnell and setting case for trial.

Dated Nov. 11, 1901. Filed Nov. 11, 1901.

Clerk's notice of time of hearing case.

Dated Nov. 11, 1901. Served Nov. 12, 1901. Filed Nov. 16, 1901.

Verified demurrer by district attorney and notice of motion thereon to strike out special plea of defendant Andrew J. Aikens.

(Served on Andrew J. Aikens.)

Dated Nov. 14, 1901. Served Nov. 15, 1901. Filed Nov. 20, 1901.

Same as above.

(Served on Timlin, Glicksman & Conway.)

Dated Nov. 14, 1901. Served Nov. 15, 1901. Filed Nov. 20, 1901.

Exceptions of defendant Andrew J. Aikens to judgment of court of Nov. 20, 1901.

Dated Nov. 20, 1901. Filed Nov. 20, 1901.

Recognizance of defendant Andrew J. Aikens in sum of $500.

Approved and filed Nov. 20, 1901.

Bill of exceptions of defendant Andrew J. Aikens.

Served Nov. 25, 1901. Filed Nov. 26, 1901.

Notice of filing writ of error of defendant Andrew J. Aikens, with copy of said writ of error.

Served and filed Nov. 26, 1901.

23 Plea of defendant Albert Huegin.

Filed Oct. 21, 1901.

Verified demurrer by district attorney, and notice of motion thereon to strike out special plea of defendant Albert Huegin.

(Served on Albert Huegin.)

Dated Nov. 14, 1901. Served Nov. 15, 1901. Filed Nov. 20, 1901.

Same as above.

(Served on Van Dyke, Van Dyke & Carter.)

Dated Nov. 14, 1901. Served Nov. 15, 1901. Filed Nov. 20, 1901.

Exceptions of defendant Albert Huegin to judgment of court of Nov. 20, 1901.

Dated and filed Nov. 20, 1901.

Recognizance of defendant Albert Huegin in sum of $500.

Approved and filed Nov. 20, 1901.

Bill of exceptions of defendant Albert Huegin.

Filed Nov. 26, 1901.

Notice of filing writ of error of defendant Albert Huegin, with copy of said writ of error.

Served and filed Nov. 26, 1901.

24 *Demurrer of Defendant Melvin A. Hoyt.*

Filed Oct. 21, 1901.

Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT, ANDREW J. AIKENS, and ALBERT HUEGIN, Defendants.

And the said Melvin A. Hoyt separately and in his own proper person, cometh into court here, and having heard the information

read, saith that the said information, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and in addition thereto this defendant alleges, the following special objections to the said information, to wit:

(1.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the other defendants named in the said information, were such conspiracies, combinations, confederations, associations, agreements and understandings as this defendant and the said other defendants had a lawful right to make and enter into as forming a part of their legitimate trade and competition between the said defendants with the said Journal Company and its officers and stockholders in the lawful conduct of the business of this defendant and the said other defendants as publishers of the newspapers respectively conducted by the said defendants, and the said Journal Company.

(2.) That the several acts charged in the said information as having been performed by this defendant and the said other defendants, do not state any criminal offense known to the law, but such acts, and each and every of them, were lawful and legitimate acts of competition in trade such as this defendant and said other defendants had lawful right to perform in the law.

(3.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings had between this defendant and the said other defendants Andrew J. Aikens and Albert Huegin, were such conspiracies, combinations, associations, agreements and mutual understandings as this defendant and the said other defendants, as citizens of the United States and the State of Wisconsin, had lawful right to make and enter into in the conduct and management of the said several newspapers so published by this defendant and the said other defendants, Andrew J. Aikens and the said Albert Huegin respectively, under the Constitution and laws of the United States, and especially under and by virtue of the provisions of article XIV of the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(4.) That the several acts charged therein, as having been done and performed by this defendant and the said other defendants, Andrew J. Aikens and Albert Huegin, in furtherance of the said alleged several conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the said other defendants, were severally and respectively such acts as this defendant and the said other defendants had lawful right to do and perform as citizens of the United States and of the State of Wisconsin, as lawful and legitimate conspiracies, combinations, confederations, associations, agreements and mutual understandings, in the conduct of the business of this defendant and the publications of his said newspaper, and that of the newspapers of said other defendants, and in the publication of the said newspapers

published by them respectively, and that such acts were innocent acts and lawful acts of competition in the trade and business of this defendant and in the trade and business of the said other defendants, under the Constitution and laws of the United States and especially under the provisions of article XIV of the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(5.) And because the said information does not state any fact or facts which constitute a criminal offense known to the laws of the State of Wisconsin, but the acts so charged were and are legitimate acts of trade and competition such as any citizen of said State might lawfully employ in the conduct of his business; and this he is ready to verify.

Wherefore, for want of a sufficient information in this behalf,
26 the said Melvin A. Hoyt prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said information specified.

NEWTON S. MURPHEY,
Attorney for Melvin A. Hoyt, One of the Defendants.

Filed Oct. 21, 1901.

Exceptions of defendant Melvin A. Hoyt to judgment of court of Nov. 20, 1901.

Dated and filed Nov. 20, 1901.

Recognizance of defendant Melvin A. Hoyt in sum of $500.

Approved and filed Nov. 20, 1901.

Bill of exceptions of defendant Melvin A. Hoyt.

Filed Nov. 26, 1901.

STATE OF WISCONSIN:

Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT ET AL., Defendants.

At a regular term of said court holden on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter judge was disqualified to try said cause, having heretofore acted for the said State in this matter, as district attorney for the county of Milwaukee, the State of Wisconsin appearing by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant Melvin A. Hoyt aforesaid appearing by Newton S. Murphey, his attorney, and the following proceedings were had: The said cause

coming on to be heard upon the demurrer heretofore filed by the said defendant Melvin A. Hoyt to the information filed herein by said district attorney, and after hearing the said district attorney for the State in opposition to the said demurrer, and the defendant Melvin A. Hoyt by his said attorney in support thereof, and
27 the court being advised in the premises, whereupon the court ordered that the said demurrer of the said defendant Melvin A. Hoyt be and the same was thereby overruled, to which ruling the said defendant Melvin A. Hoyt then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Melvin A. Hoyt declared that he stood upon said demurrer and did not desire to plead over. The court thereupon found the said defendant Melvin A. Hoyt guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars, together with sixty-seven and $\frac{10}{100}$ dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said defendant Melvin A. Hoyt then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Melvin A. Hoyt in the cause aforesaid.

Dated November 23, A. D. 1901.

GEORGE W. BURNELL, [SEAL.]
Judge, Presiding.

Filed Nov. 26, 1901.

28 Certificate of clerk to transcript of record.

Return of clerk to writ of error.

Dated Dec. 4, 1901.

Writ of error from supreme court of State of Wisconsin to municipal court of Milwaukee county.

Filed Nov. 26, 1901.

29 STATE OF WISCONSIN:

In Supreme Court.

ANDREW J. AIKENS, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

ALBERT HUEGIN, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

Each of the plaintiffs in error sued out his proper writ to review a judgment of the municipal court of Milwaukee county, adjudging him guilty of having committed an offense by violating section 4466*a* R. S. 1898, as charged in the information. The sufficiency of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4466*a id.*, were considered by this court and sustained on a review of *habeas corpus* proceedings on writs of error, the causes being reported in 110 Wis., p. 189. On such review there was no question but that the complaint fully satisfied the statute. It was challenged, and the statute as well, on constitutional grounds. After such decision the causes were remanded for further proceedings according to law, whereupon an information was duly filed, charging the accused persons in all respects substantially as in the complaint, which had been passed upon as aforesaid.

Upon being duly arraigned upon such information, Andrew J. Aikens and Albert Huegin separately filed pleas admitting the charge made against them, but insisting that the same did
30 not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute a punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information, and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis. 189. The trial court followed that decision as it was bound to do. As we understand the matter the information contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect plead guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

31 UNITED STATES OF AMERICA, *ss*:

To the State of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Melvin A. Hoyt is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin this 11th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

Madison, Wis., March 11, 1902.—Received copy of the above and foregoing citation.

E. B. HICKS,
Att'y General for the State of Wisconsin.

32 Supreme Court of the United States.

STATE OF WISCONSIN, Defendant in Error,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Plaintiffs in Error.

Know all men by these presents, that we, William H. Park and Newton S. Murphey of Milwaukee, Wisconsin, are held and firmly bound unto the State of Wisconsin in the sum of one thousand (1,000) dollars, to be paid to the said State of Wisconsin or its assigns.

To which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 10th day of March, A. D. 1902.

Whereas the above-named Melvin A. Hoyt, one of the said plaintiffs in error, hath in his own right prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Wisconsin,

Now therefore the condition of this obligation is such that if the above-named Melvin A. Hoyt shall prosecute his said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAM H. PARK. [SEAL.]
NEWTON S. MURPHEY. [SEAL.]

Signed, sealed and delivered in presence of—

A. G. MILLER.
HERBERT N. LAFLIN.

33 UNITED STATES OF AMERICA, } ss:
State of Wisconsin, }

On this tenth day of March, A. D. 1902, personally appeared before me William H. Park and Newton S. Murphey, who signed the above and foregoing bond, and being each duly sworn, doth, each for himself, depose and say that he is a resident of the city and county of Milwaukee, in the State of Wisconsin, and is worth the sum of two thousand (2,000) dollars over and above all debts and exemptions.

WILLIAM H. PARK.
NEWTON S. MURPHEY.

Subscribed and sworn to before me this tenth day of March, A. D. 1902.

A. G. MILLER,
[SEAL.] *Notary Public, Milwaukee, Wis.*

34 [Endorsed:] State of Wisconsin supreme court. State of Wisconsin, def't in error, *vs.* Melvin A. Hoyt, pl't'ffs in error. Bond on writ of error. The within bond is hereby approved March 11, 1902. John B. Cassoday, chief justice of supreme court of the State of Wisconsin. Filed March 11, 1902. Clarence Kellogg, clerk of supreme court, Wis.

35 STATE OF WISCONSIN:

Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
MELVIN A. HOYT, Plaintiff in Error.

Melvin A. Hoyt, the plaintiff in error in the above-entitled cause, files the following assignments of error upon which he will rely to wit:

(1.) The supreme court of the State of Wisconsin erred in affirming the judgment of the municipal court of Milwaukee county in the State of Wisconsin, which overruled by its judgment the demurrer filed by the said Melvin A. Hoyt to the information filed in the said municipal court, and in holding that the said information stated a criminal offense.

(2.) The supreme court of the State of Wisconsin erred in affirming by its judgment the findings and judgment of the said municipal court of the county of Milwaukee, in said State, and in adjudging the said Melvin A. Hoyt, plaintiff in error, guilty of a conspiracy as charged in the information filed in said last-mentioned court, and in imposing a fine and sentence in pursuance thereof on him, the said Melvin A. Hoyt.

(3.) And the said supreme court of the State of Wisconsin further erred in affirming the judgment of the said municipal court in holding and adjudging that all or any of the several acts charged in the said information to have been performed, or done, by the said

36 Melvin A. Hoyt, or agreed to be done, or performed, by him singly or in combination with Andrew J. Aikens and Albert Huegen, the said coplaintiff in error with the said Melvin A. Hoyt, or either of them, were criminal, unlawful or prohibited combinations.

(4.) That the said supreme court of the State of Wisconsin further erred by its said judgment by holding and adjudging that the provisions of article 14 (XIV) of the amendments of the Constitution of the United States, though a construction of said article 14 was thereby necessarily drawn in question in such adjudication, was not a protection in the law of the said Melvin A. Hoyt against any combination act or acts charged in said information to have been done, or agreed to be done by the said Melvin A. Hoyt, either singly, or in combination with the said Andrew J. Aikens and Albert Huegen, or either of them, whereby the said Melvin A. Hoyt was deprived of his rights, privileges and immunities secured to him by the said article 14 of the amendments of the Constitution of the United States, and of the liberty, property and due process of law secured to him as a citizen of the United States and of the State of Wisconsin.

(5.) And the said supreme court of the State of Wisconsin further erred in holding and adjudging that section 4466*a* of Sanborn & Berryman's edition of the Revised Statutes of the State of Wisconsin

for the year A. D. 1898, though necessarily drawn in question in the aforesaid judgment of the said supreme court of the State of Wisconsin, was valid, and that the same was not repugnant to the Constitution of the United States, and especially to the said article 14 of the amendments to said Constitution, and in sustaining the validity of said statute, and by holding as it did hold, a valid enactment, whereby the said Melvin A. Hoyt was deprived of his rights,
37 privileges and immunities as a citizen of the United States and of the State of Wisconsin, and of the liberty, property and due process of law secured to him by the said article 14 of the amendments to the Constitution of the United States.

And the said Melvin A. Hoyt prays that the judgment aforesaid may be reversed, annul-ed and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

NEWTON S. MURPHEY,
Attorney for the Plaintiff in Error, Melvin A. Hoyt.

38 [Endorsed:] State of Wisconsin supreme court State of Wisconsin def't in error *v.* Melvin A. Hoyt plaintiff in error. Assignment of errors. Original Filed Mar. 11 1902 Clarence Kellogg, clerk of supreme court, Wis. Newton S. Murphey att'y for pl'ff in error Melvin A. Hoyt.

39 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the first Tuesday, to wit, the seventh day of January, A. D. 1902.

Present: John B. Cassoday, chief justice, John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to wit: on the fifth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, Melvin A. Hoyt, and filed in said court his certain bond on writ of error; and on the sixth day of December, in the year of our Lord one thousand nine hundred and one, came into the office of the clerk of the supreme court of the State of Wisconsin, the said Melvin A. Hoyt, and filed in said court his certain writ of error, according to the statute in such case made and provided, and also the return to such writ of error, of the clerk of the municipal court of Milwaukee county, in said State, in the words and figures following, that is to say:

40 Know all men by these presents, that we, Melvin A. Hoyt as principal and W. H. Park and Henry J. Baumgartner as sureties, all of the city of Milwaukee in the State of Wisconsin, are held and firmly bound unto the State of Wisconsin in the sum of two hundred and fifty dollars ($250) to be paid to the said State of

Wisconsin, its representatives or assigns; to which payment well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents.

Sealed with our seals the 25th day of November, A. D. 1901.

Whereas, in a criminal action pending in the municipal court of Milwaukee county, in said State, wherein The State of Wisconsin was plaintiff and the said Melvin A. Hoyt, Andrew J. Aikens and Albert Huegin were defendants, was on the 26th day of November, A. D. 1901, tried and disposed of by the said municipal court of Milwaukee county and a final judgment therein rendered in favor of the State of Wisconsin and against the said Melvin A. Hoyt, whereby the said Melvin A. Hoyt was adjudged and declared by the said court to be guilty as charged in the information filed in said court against him, the said Melvin A. Hoyt, and the said Melvin A. Hoyt was thereupon sentenced and adjudged to pay a fine of one hundred and fifty ($150) dollars together with sixty-seven and 10/100 dollars costs of suit and in default of such payment, to be committed to the House of Correction for Milwaukee county until such fine and costs were paid, not, however, in all exceeding 30 days.

And, whereas, the said Melvin A. Hoyt has procured the issue of a writ of error from the supreme court of the State of Wisconsin returnable to that court on the Tuesday before the second Wednesday in January of the year A. D. 1902, to review the said judgment.

Now therefore the condition of this obligation is such, that if the said Melvin A. Hoyt shall pay all costs and damages which may be awarded against him on said writ of error, and shall pay and abide the judgment of the court therein, not exceeding the aforesaid sum, then this obligation to be void, otherwise of full force and validity.

MELVIN A. HOYT. [SEAL.]
W. H. PARK. [SEAL.]
H. J. BAUMGARTNER. [SEAL.]

In presence of
N. S. MURPHY.
DOROTHY KADING.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

We, W. H. Park and Henry J. Baumgartner, being each duly sworn doth each for himself depose and say that he is one of the sureties in the above and foregoing bond and that he is a resident of the city of Milwaukee in the State of Wisconsin; that he is worth the sum of $500 over and above all his debts and liabilities, in property within this State not, by law, exempt from execution.

W. H. PARK.
H. J. BAUMGARTNER.

Subscribed and sworn to before me, this 25th day of November, A. D. 1901.

A. G. MILLER,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Supreme court. State of Wisconsin *v.* Melvin A. Hoyt *et al.* Bond on writ of error to municipal court of Milwaukee county. N. S. Murphey, att'y for Hoyt, plaintiff in error. I approve the within bond both as to form and sufficiency of surety this 26th day of Nov., 1901. Clarence Kellogg, cl'k sup. ct. Filed Nov. 26, 1901. Clarence Kellogg, clerk of supreme court, Wis.

41 STATE OF WISCONSIN, } ss:
Supreme Court, }

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Melvin A. Hoyt, Andrew J. Aikens and Albert Huegin defendants, in a criminal action for conspiracy to injure manifest error hath intervened to the great damage of the said Melvin A. Hoyt, one of said defendants as by his complaint we are informed. And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday before the second Wednesday of January, A. D. 1902 anno Domini one thousand nine hundred and two that the record and proceedings aforesaid, being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rule of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the
[SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-fifth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

[Endorsed:] State of Wisconsin, supreme court. State of Wisconsin, against Melvin A. Hoyt *et al.* Writ of error. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Filed Dec. 6, 1901. Clarence Kellogg, clerk of supreme court, Wis.

42 THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, MELVIN A. HOYT. } No. 4192.

W. H. Bennett, district attorney.
W. H. Timlin, attorney for A. J. Aikens.
Van Dyke, Carter & Van Dyke, attorneys for A. Huegin.
N. S. Murphey, attorney for M. A. Hoyt.
Hon. A. C. Brazee, presiding judge.

July 5, 1901.—The original complaint, warrant and all other papers in this case from police court, Milwaukee, received and filed.

July 18, 1900.—All the original papers in this cause sent to the circuit court of Milwaukee county; on a petition of the defendants' counsel for a writ of *habeas corpus*.

July 2, 1901.—All the original papers in this cause returned to the municipal court from the clerk of the circuit court of Milwaukee county.

October 21, 1901.—Came the district attorney for the county of Milwaukee, and in open court filed an information against the above-named defendants, endorsed: State of Wisconsin, municipal court, Milwaukee county, *ss.* I hereby certify that on the 21st day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and produced their bodies in court. Theo. Zillmer, sheriff, per Fred Stark, deputy sheriff, fees, etc. Same day defendants severally present in court, whereupon the said defendants were arraigned in open court. Reading of the information waived by the defendants severally. And the said defendants, Andrew J. Aikens and Albert Huegin, each for himself filing a special plea in bar; and the said defendant Melvin A. Hoyt, entering and filing a demurrer to the information.

43 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN
vs.
ALBERT HUEGIN ET AL.

The judge of the above-mentioned court, having been at the time of the instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20, 1901, at ten o'clock m. as the date and time when he would so attend and hold court the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial

in this court, before the said circuit judge, the Hon. Geo. W. Burnell, on the 20th day of November, 1901, at ten o'clock a. m. of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing, notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court,

A. C. BRAZEE, *Judge.*

Milwaukee, November 11, 1901.

November 20, 1901.—Defendants with their attorneys all present in open court. Hon. Geo. W. Burnell, presiding judge. Motions of pleas before made argued by counsel and submitted, court ordered that the motion to strike out the plea of the defendants Huegin and Aikens be considered a demurrer, upon application of the district attorney and the defendants' counsel, the defendants' counsel consenting. Court further ordered that the demurrer of the State as to the defendants Huegin and Aikens be sustained, the defendants declining to plead over and stand upon their plea. The demurrer of the defendant Hoyt overruled by the court, and the defendant declines to plead over and stands upon his plea. Recess taken until 2 o'clock p. m. Two o'clock p. m. defendants with their attorneys all present in open court.

Cause submitted. Whereupon court called upon the de-
44 fendants, each of them, to give any reason they might have, why sentence should not be pronounced upon him, and they giving no reason, court did upon the findings and pleadings in this cause, find the said defendants severally guilty as charged in the information aforesaid and did adjudge and determine that the defendants Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, severally, and each of *you*, pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{10}{100}$ dollars, costs, each, or in default of the payment of said fine and costs to be committed to the House of Correction of Milwaukee county until said fine and costs are paid, but such imprisonment shall not exceed in all thirty days each. And now comes the defendants severally, by their attorneys and files exceptions to the judgment of the court. Exceptions allowed by the court.

Fines.....	$450.00
Costs.....	201.31
Total..	$651.31

And now comes the defendants, severally and each of them, by their attorney, and ask for a stay of proceedings in this cause pending the defendants' appeal to the supreme court, until the remittitur shall be returned herein from said supreme court. Stay granted by the court, and pending the stay of proceedings court ordered that the defendants recognize in the sum of five hundred dollars each. Bail given.

Nov. 26, 1901.—Writ of error as to all of the defendants in above cause from the Hon. John B. Cassoday, chief justice of the State of Wisconsin, filed. Bill of exceptions as to all of the above-named

defendants filed. Notice of filing writ of error from defendants' attorneys filed.

45 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court, do hereby certify that I have compared the foregoing copy with the original record entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court, this fourth day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

46 *Capias.*

STATE OF WISCONSIN, ss:

Municipal Court for the City and County of Milwaukee.

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

We command you, that you take Albert Huegin And. J. Aikens ..... and Melvin A. Hoyt ..... and them safely keep, so that you may have their bodies before the municipal court of the county of Milwaukee aforesaid, at the court-room [SEAL.] in Milwaukee, forthwith then and there to answer unto an information pending against them in said court for conspiracy ..... to injure ..... which shall then and there be made to appear, and of this writ make due return.

Witness, the Hon. A. C. Brazee, judge of the municipal court of said county and city at Milwaukee, the 21st day of October in the year of our Lord one thousand nine hundred and one.

FRANK E. WOLLER,
Clerk of the Municipal Court,
By THOS. V. DALLY, *Deputy.*

—— ——, *Attorneys.*

(Endorsements.)

STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I hereby certify that on the twenty-first day of October, 1901, at the city of Milwaukee, in said county, I arrested the within-named Albert Huegin, And. J. Aikens and Melvin A. Hoyt, and produced their bodies in court.

Fees.

Service	$2.00
Travel	.20
Attendance	4.50
Return	.25
Total	$6.95

THEODORE ZILLMER, *Sheriff*,
Per FRED STARK, *Dep. Sheriff.*

No. 4192. October term, A. D. 1901. Municipal court, Milwaukee county. The State of Wisconsin *v.* Albert Huegin *et al.* Capias. Docket No. 2289. Theo. Zillmer, sheriff. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

47 Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

I, W. H. Bennett, district attorney for Milwaukee county, hereby inform the court that on the 5th day of April, in the year one thousand nine hundred, at the city of Milwaukee, and within said county of Milwaukee, Wisconsin, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did, then and there, unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring The Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business and for the purpose and with the intent then and there of wilfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said, The Journal Company, at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as The Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons as is customary with such newspapers, and that at all of said times and especially at the time

of the said combination and conspiracy, and subsequently
48 thereto, the said The Journal Company had a large number of advertisers or patrons who advertised in said newspaper, The Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of said The Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

That the prices for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900 said The Journal Company in good faith established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

That at all of said times the said Andrew J. Aikens was and now is the business manager of The Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of The Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee having an extensive circulation and devoted to the purposes of a general newspaper and to advertise for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was and now is the editor of The Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to
49 the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

That on or about the 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously and unlawfully injuring said The Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T.

Boyd and John W. Schaum, and each of them, in their trade and business and to that end, and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about 25 per cent. in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel, and The Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was
50 and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt did refuse to allow the advertisements of divers merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin or The Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of the said last three mentioned newspapers because such merchant or other persons so prevented had paid or

agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Wisconsin.

Dated at Milwaukee, in said county, this seventh day of October, in the year one thousand nine hundred and one.

W. H. BENNETT,
District Attorney, Milwaukee County, Wis.

(Endorsements:) Prisoners arraigned in open court this 21st day of October, 1901, and the said defendants Andrew J. Aikens and Albert Huegin each for himself filing a special plea in bar, and the said defendant Melvin A. Hoyt entering and filing a demurrer to the information. A. C. Brazee, municipal judge. Municipal court, Milwaukee county. State of Wisconsin against Andrew J. Aikens *et al.* Information for conspiracy. W. H. Bennett, district attorney. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

51 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Andrew J. Aikens in his own proper person cometh into court and having heard the information read, pleads thereto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred The Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April

A. D. one thousand nine hundred and subsequently thereto, the said The Journal Company, had a large number or advertisers or patrons who advertised in said newspaper, The Milwaukee Journal, and that a large proportion of the revenue of said The Journal Company, was and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholders in said The Journal Company and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things that of editor of said The Milwaukee Journal, and the business and trade of said Loyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

52

And further, that the prices for advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of The Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of The Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of The Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other said newspapers.

And further, that on or about the fifth day of April, A. D. one thousand nine hundred, the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and

53

mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five percentum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of said combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel and The Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt, and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that pursuant to said combination, agreement and confederation and in furtherance thereof the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin or The

54

Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant- or other persons so prevented had paid or agreed to pay the said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the hereinbefore mentioned acts, intentions and agreements and combinations were done, harbored, made and entered into in trade competition, and that such hereinbefore mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants, the said Albert Huegin and Melvin A. Hoyt, was, during all said times last mentioned and now is, a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of
55 his said codefendants was engaged at the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than The Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company or any stockholder thereof in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore, the said Andrew J. Aikens prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, etc..

ANDREW J. AIKENS.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens being duly sworn, says he has signed the foregoing plea and knows its contents and that the same is true.

ANDREW J. AIKENS.

Subscribed and sworn to before me, October 21, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

W. H. TIMLIN,
Attorney and Counsellor at Law.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* A. J. Aikens *et al.* A. J. Aikens. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

56 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The judge of the above-mentioned court having been at the time of instituting of the prosecution of the above-entitled cause district attorney of Milwaukee county, and having been consulted in regard to the same, and having been attorney for the prosecution in said cause, and the judge of this court having for said reasons called upon the Hon. George W. Burnell, circuit judge of the third judicial circuit, to attend and hold court during the trial of said cause, and the said circuit judge, the Hon. George W. Burnell, having consented to attend and hold court during the trial of this cause, and having set Wednesday, November 20th, 1901, at ten o'clock a. m., as the date and time when he would so attend and hold court for the trial of said cause, it is hereby

Ordered, that this cause be, and the same hereby is, set for trial in this court before the said circuit judge, the Hon. George W. Burnell, on the 20th day of November, 1901, at ten o'clock, a. m. of said day, and it is hereby further

Ordered, that the clerk of this court shall, in writing notify the parties in this cause and their respective attorneys of the time and place set for the hearing of said cause, and of the judge who will preside therein.

By the court,

A. C. BRAZEE, *Judge.*

Milwaukee, November 11th, 1901.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Order setting case for trial. Filed Nov. 11, 1901. Frank E. Woller, clerk of municipal court.

57 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and Van Dyke, Van Dyke & Carter, his attorneys; to Andrew J. Aikens and Timlin, Glicksman & Conway, his attorneys, and to Melvin A. Hoyt and N. S. Murphy, his attorney:

Please take notice, that Hon. George W. Burnell, circuit judge of the third judicial circuit, who was heretofore called by Hon. A. C. Brazee, judge of the municipal court, has consented to attend and hold court during the trial of the above cause; and you, and each of you, are hereby notified that the above cause has been set for trial before said circuit judge, the Hon. George W. Burnell, Wednesday, November 20, 1901, at ten o'clock a. m. of said day, at the municipal court room, in the city hall of the city of Milwaukee, county of Milwaukee, Wisconsin.

By order of the court.

FRANK E. WOLLER,
Clerk of the Municipal Court.

Dated this 11th day of November, 1901.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 12th day of November, 1901, I served the within notice on the within-named Albert Huegin, one of the defendants, on Van Dyke, Van Dyke & Carter, his attorneys; on Andrew J. Aikens, one of the defendants, on Timlin, Glicksman & Conway, his attorneys; and on Melvin A Hoyt, one of the defendants; and on N. S. Murphy, his attorney, personally, by delivering to and leaving with each of them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on each copy so served.

THEODORE ZILLMER, *Sheriff.*
Per Z. CLAYTON, *Deputy.*

Service	$1.50
Copies	.10
Travel	.20
Ret	.25
	$2.05

Municipal court, Milwaukee county. State of Wisconsin v. Albert Hoegin et al. Notice of time of hearing. Filed Nov. 16, 1903. Frank E. Waller, clerk of municipal court. Docket No. 2499. Theodore Zillmer, sheriff.

98 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HOEGIN, ANDREW J. AIKENS, and MELVIN A. HUTT, Defendants.

To Andrew J. Aikens and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 28th day of November, 1903, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1903, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1903.

99 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HOEGIN, ANDREW J. AIKENS, and MELVIN A. HUTT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1903, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the

plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn, on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
60 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2518. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Andrew J. Aikens, personally, by delivering to and leaving with him a true copy thereof.

I further certify, that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret.	.25
	$2.25

61 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Andrew J. Aikens and to Timlin, Glicksman & Conway, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon as counsel can be heard, to strike out the special plea in bar filed by the said defendant, Andrew J. Aikens, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wisconsin.

Dated this 14th day of November, A. D. 1901.

(Endorsements.)

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Timlin, Glicksman & Conway personally by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date thereon, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
By Z. CLAYTON, *Deputy.*

Service	1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

62 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

And now comes the plaintiff, The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Andrew J. Aikens, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter by Andrew J. Aikens, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Andrew J. Aikens, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of sufficient plea in this behalf on the part of said defendant, Andrew J. Aikens, The State of Wisconsin, the plaintiff herein, prays, that the said plea of the said Andrew J. Aikens be stricken out and that the said defendant, Andrew J. Aikens, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
63 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *vs.* Albert Huegin *et al.* Docket No. 2521. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court. W. H. Bennett, district attorney.

64 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Andrew J. Aikens, having filed and served a special plea in bar, and the district attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Andrew J. Aikens then and there duly excepted, said exception is hereby allowed and signed, and the said Andrew J. Aikens thereupon declared in open court that he stood upon said plea, and the court thereupon found Andrew J. Aikens guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67 10/100 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Andrew J. Aikens be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Andrew J. Aikens duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Andrew J. Aikens asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Andrew J. Aikens recognize to the State of Wisconsin in the sum of five hundred dollars, with sufficient sureties for his personal ap-
65 pearance at the supreme court at the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEORGE W. BURNELL,
Judge, Presiding.

(Endorsements): Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. W. H. Timlin, attorney for Andrew J. Aikens. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

66 STATE OF WISCONSIN, } ss:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, of the county of Milwaukee, acknowledge ourselves to be indebted

to the State of Wisconsin in the sum of $500.00 *dollars*, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Andrew J. Aikens was, on the 20th day of November. A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of 150.00 dollars, and costs taxed at $67\frac{1}{100}$ dollars, and to be committed to the House of Correction of said county, until such fine and costs are paid or discharged, such imprisonment not to exceed 30 days; and whereas, the said Andrew J. Aikens has presented exceptions under section 7220 R. S. which were allowed, preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin; now, therefore, if the said Andrew J. Aikens shall personally appear in the supreme court of the State of Wisconsin on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

67 (Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against A. J. Aikens. Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Andrew J. Aikens, and Herman Bleyer and F. M. Harbach, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within the State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

A. J. AIKENS.
HERMAN BLEYER.
FRANK M. HARBACH.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20th, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

68 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS ET AL., Defendants.

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell, judge presiding, who having been called in by Judge A. C. Brazee for the reason that the latter was disqualified having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid, Andrew J. Aikens, appeared by W. H. Timlin, his attorney, and the following proceedings were had: said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Andrew J. Aikens, and after hearing the said district attorney for said motion and the said W. H. Timlin, opposed, said motion was denied; whereupon the said district attorney asked that his motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said W. H Timlin in behalf of the accused defendant Andrew J. Aikens, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Andrew J. Aikens then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Andrew J. Aikens declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars together with sixty-seven and $\frac{10}{100}$ (67.10) dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Andrew J. Aikens then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed, and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Andrew J. Aikens in the cause aforesaid.

Dated November 25, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff, *v.* Andrew J. Aikens, defendant. Bill of exceptions. W. H. Timlin, 105 Grand Av., Milwaukee, defendant's attorney. Due service admitted this 25th day of November, 1901.

W. H. Bennett, dist. att'y. and attorney for plaintiff, State of Wisconsin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

69 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Andrew J. Aikens, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc.,
W. H. TIMLIN,
Attorney for A. J. Aikens, Defendant.

70 STATE OF WISCONSIN, *Supreme Court,* } *ss:*

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the municipal court of Milwaukee county aforesaid, before you, between The State of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, defendants, in a criminal prosecution for misdemeanor manifest error hath intervened to the great damage of the said Andrew J. Aikens, as by his complaint we are informed.

And we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the State of Wisconsin, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same and this writ, so that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesday next preceding the second Wednesday in January anno Domini one thousand nine hundred and two that the record and proceedings aforesaid being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the
[SEAL.] supreme court of the State of Wisconsin, at Madison, this twenty-sixth day of November, A. D. 1901.

Attest: CLARENCE KELLOGG, *Clerk.*

71 Municipal court, Milwaukee county. State of Wisconsin, plaintiff *v.* Andrew J. Aikens *et al.*, defendants. Notice of filing writ of error. W. H. Timlin, 105 Grand Av., Milwaukee, A. J. Aikens' attorney. Due service admitted this 26th day of November, 1901. W. H. Bennett, dist. att'y & attorney for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

72 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

The said Albert Huegin in his own proper person cometh into court, and having heard the information read, pleads thereunto and says:

That he avers, confesses and admits that on the 5th day of April in the year A. D. one thousand nine hundred The Journal Company in said information named at all of said times was and ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as The Milwaukee Journal published at the city of Milwaukee, which said newspaper at all of the times therein referred to had and now has a large circulation as a newspaper and advertising medium in the city of Milwaukee and throughout the State of Wisconsin and elsewhere, and that it was at all of said times and now is the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers and to solicit and receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially on the fifth day of April A. D. one thousand nine hundred and subsequently thereto, the said The Journal Company, had a large number of advertisers or patrons who advertised in said newspaper, The Milwaukee Journal,

73 and that a large proportion of the revenue of said The Journal Company, was and is derived from such advertisements; and that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum in said information named, were at all of said times and now are stockholders in said The Journal Company and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is among other things that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company, and said The Milwaukee Journal, and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

And further, that the price for advertisements and the advertising

rates which newspapers such as said The Milwaukee Journal and the other newspapers in said information mentioned are entitled to charge, and which advertisers and patrons are willing to pay, had been and are based largely upon the circulation of such papers and the number of their readers.

And further, that early in the year A. D. one thousand nine hundred said The Journal Company, in good faith established a new rate for advertising in said The Milwaukee Journal based among other things upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per centum above that which was charged by said The Journal Company for like advertising in the year A. D. one thousand eight hundred and ninety-nine.

And further, that at all of said times the said Andrew J. Aikens was and now is the business manager of The Evening Wisconsin, a daily newspaper published in the city of Milwaukee and having also an extensive circulation and devoted to the purposes of
74 a general newspaper and to advertising for hire like unto the said The Milwaukee Journal; that at all of said times said Albert Huegin was the business manager of The Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire like unto the other newspapers aforementioned; and that at all of said times said Melvin A. Hoyt was and now is the editor of The Milwaukee Daily News and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire like unto the other of said newspapers.

And further, that on or about the fifth day of April, A. D. one thousand nine hundred, the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, in furtherance and pursuance of a combination, confederation, association, agreement and mutual understanding for the purpose then and there and with the intent of injuring the said The Journal Company in its trade and business and also the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with such purpose and intent did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit, said The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them, or to the respective owners or proprietors of
75 them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively,

to wit, about twenty-five per centum in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising, but that in case any merchant, other person or corporation should refuse to pay to the said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively.

And further, that a large number of merchants in the city of Milwaukee, and other persons, were at the time of such combination and agreement and subsequently thereto advertising in all of said newspapers, to wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel and The Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired.

And further, that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were pursuant to said combination and confederacy on the part of said Albert Huegin, Andrew J. Aikens and Melvin A. Hoyt and in furtherance thereof notified by them of the said agreement and combination between the said Aikens, Hoyt and Huegin that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and that pursuant to said combination, agreement and confederation and in furtherance thereof
76 the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt had refused to allow the advertisements of divers merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin or The Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in any or all of said last three mentioned newspapers because such merchant-, or other persons so prevented had paid or agreed to pay to said The Journal Company, the said increased rate for advertising established by it as aforesaid, and that by reason of said combination and agreement many merchants in the city of Milwaukee and elsewhere and other persons were prevented from advertising in said The Milwaukee Journal greatly to the injury of the business and trade of said The Journal Company and of the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them; and that the hereinbefore-mentioned acts, intentions, and agreements and combinations were done, harbored, made and entered into in trade competition, and that such hereinbefore-mentioned acts, intentions, agreements and combinations, and none other, constitute the alleged unlawful conspiracy in said information mentioned.

And this defendant submits to this honorable court that notwithstanding the foregoing the State of Wisconsin ought not further to prosecute the information against him because for more than twenty years last past and at all times in said information mentioned he was and he now is, and he at all said times has been, a lawful citizen of the United States and of the State of Wisconsin, and that each of his said codefendants the said Andrew J. Aikens and Melvin A. Hoyt was during all said times last mentioned and now is a lawful citizen of the United States and of the State of Wisconsin, and that during all the times in said information mentioned and for many years prior to said time this defendant and each of his said codefendants was
77 engaged at the city of Milwaukee in the county of Milwaukee in the State of Wisconsin in his business, trade or calling of managing the business departments respectively of the newspapers mentioned in said information other than The Milwaukee Journal and in procuring and securing advertising patronage and custom for said newspapers last mentioned in lawful trade or business competition with said The Milwaukee Journal, and that therefore this defendant and his said codefendants at all times in said information mentioned had and enjoyed the right, privilege and immunity as free men and as such citizens of the United States and of the State of Wisconsin and as such competitors in business, any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary notwithstanding, under article 14 of the Constitution of the United States to combine, associate, confederate and agree together for the purpose of injuring the said The Journal Company, or any stockholder thereof, in its said The Journal Company's trade and business by doing the things and making the agreements in said information set out and herein confessed and admitted.

Wherefore the said Albert Huegin prays judgment on the said information that it be quashed and held for naught and he go hence without day, and will ever pray, &c.

ALBERT HUEGIN.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Albert Huegin, being duly sworn, says he has signed the foregoing plea and knows its contents and that the same is true.

ALBERT HUEGIN.

Subscribed and sworn to before me, October 21st, A. D. 1901.

EDWARD A. CONWAY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Jan. 1st, 1905.

I certify that in my opinion the foregoing plea is good and sufficient in law.

GEO. D. VAN DYKE,
Attorney and Counselor at Law.

78 (Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* A. Huegin *et al.* A. Huegin. Filed Oct. 21, 1901. Frank E. Woller, clerk of municipal court.

79 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. AIKENS, and MELVIN A. HOYT, Defendants.

To Albert Huegin and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application hereto annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon thereafter as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 14th day of November, A. D. 1901.

80 (Endorsements.)

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Albert Huegin, personally, by delivering to and leaving with him a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name, and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

81 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUGGIN, ANDREW J. AIKENS, and MELVIN A. HUNT, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says, that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huggin, to answer to same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huggin, one of the defendants, for the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huggin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in this behalf on the part of said defendant, Albert Huggin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huggin is stricken out and that the said defendant, Albert Huggin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows its
82 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 16th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huggin *et al.* W. H. Bennett, district attorney. Docket No. 2519. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

60 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. ROGERS, and MICHAEL A. ROSE, Defendants.

To Albert Huegin and to Van Dyke, Van Dyke & Carter, his attorneys:

Please take notice, that upon the application herein annexed, a copy of which is herewith served upon you, and on all the pleadings heretofore filed and served in the above-entitled matter, the State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the State in the above-entitled matter, will move the court on the 20th day of November, 1901, at the opening of court on that day, or as soon thereafter as counsel can be heard, to strike out the special plea in bar filed by said defendant, Albert Huegin, herein, on the 21st day of October, 1901, for the reasons set forth in the annexed petition.

W. H. BENNETT,
District Attorney in and for Milwaukee County, Wis.

Dated this 16th day of November, A. D. 1901.

61 Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
ALBERT HUEGIN, ANDREW J. ROGERS, and MICHAEL A. ROSE, Defendants.

And now comes the plaintiff The State of Wisconsin, by W. H. Bennett, district attorney for Milwaukee county, who prosecutes for the said State in this behalf, and says that the information herein and all matters therein contained in manner and form are sufficient in law to compel the said defendant, Albert Huegin, to answer the same.

And further says, as to the plea filed October 21, 1901, in the above-entitled matter, by Albert Huegin, one of the defendants, that the same and all matters therein contained in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said State from prosecuting the said information against him, the said Albert Huegin, and that the said State is not bound by the law of the land to answer the same.

Wherefore, for want of a sufficient plea in his behalf on the part of said defendant, Albert Huegin, The State of Wisconsin, the plaintiff herein, prays that the said plea of the said Albert Huegin be stricken out and that the said defendant, Albert Huegin, be directed and required to plead to the said information in the manner and form provided by law.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

W. H. Bennett, being first duly sworn on oath, deposes and says, that he is the district attorney in and for the county of Milwaukee; that he has heard read the foregoing petition and knows the
85 contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

W. H. BENNETT.

Subscribed and sworn to before me, this 14th day of November, A. D. 1901.

F. J. KNOELL,
Notary Public, Milwaukee County, Wisconsin.

(Endorsements.)

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I hereby certify that at the city of Milwaukee, in said county, on the 15th day of November, 1901, I served the within notice and affidavit annexed on the within-named Van Dyke, Van Dyke & Carter, personally, by delivering to and leaving with them a true copy thereof.

I further certify that at the time of said service I endorsed the date of service, my name and official title on the copy so served.

THEODORE ZILLMER, *Sheriff,*
Per Z. CLAYTON, *Deputy.*

Service	$1.00
Copies	.80
Travel	.20
Ret	.25
	$2.25

Municipal court, Milwaukee county. State of Wisconsin *v.* Albert Huegin *et al.* W. H. Bennett, district attorney. Docket No. 2520. Theodore Zillmer, sheriff. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

86 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff, }
vs.
ALBERT HUEGIN ET AL., Defendants. }

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Albert

Huegin, having filed and served a special plea in bar, and the district attorney having demurred to said plea, and the court having sustained said demurrer, to which ruling the said Albert Huegin then and there duly excepted, said exception is hereby allowed and signed, and the said Albert Huegin thereupon declared in open court that he stood upon said plea, and the court thereupon found Albert Huegin guilty as charged in the information, and sentenced him to pay a fine of 150 dollars, together with 67.10 dollars, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Albert Huegin be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Albert Huegin duly excepted, and the exception is hereby allowed and signed. And thereupon, the said Albert Huegin asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause in this court, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Albert Huegin recognize to the State of Wisconsin in the sum of $500 *dollars*, with sufficient sureties for his personal appearance at the supreme court at
87 the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Andrew J. Aikens *et al.* Exceptions. Geo. D. Van Dyke, attorney for Albert Huegin. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

88 STATE OF WISCONSIN, } *ss*:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Albert Huegin, and J. H. Puelicher and Herman Bleyer, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Albert Huegin was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure, and sentenced to pay a fine of one hundred and fifty dollars and costs taxed at sixty-seven and 10/100 dollars, aggregating $217.10, and to be committed to the

House of Correction of said county, until such fine and costs are paid or discharged, such imprisonment not to exceed 30 days; and whereas, the said Albert Huegin has presented exceptions which were allowed and signed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin.

Now, therefore, if the said Albert Huegin shall personally appear in said supreme court on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and there prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

ALBERT HUEGIN.
HERMAN BLEYER.
J. H. PUELICHER.

89 STATE OF WISCONSIN, } ss:
Milwaukee County, }

J. H. Puelicher and Herman Bleyer, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

J. H. PUELICHER.
HERMAN BLEYER.

Subscribed and sworn to before me this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Albert Huegin. Recognizance for appeal. Approved as to form and sufficiency of sureties this 20th day of November, 1901. George W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

90 In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff, }
vs. }
ALBERT HUEGIN ET AL., Defendants. }

At a regular term of said court current on November 20, A. D. 1901, Honorable George W. Burnell judge presiding, who *having*

been called in by Judge A. C. Brazee for the reason that the latter was disqualified having heretofore acted for the State in this matter, the State of Wisconsin appeared by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant aforesaid Albert Huegin appeared by George D. Van Dyke, his attorney and the following proceedings were had; said district attorney in behalf of the State presented his motion to strike out the special plea in bar interposed by the said defendant Albert Huegin, and after hearing the said district attorney for said motion and the said Albert Huegin opposed, said motion was denied; whereupon the said district attorney asked that his said motion papers might stand and be considered as a demurrer to such special plea in bar and the accused defendant consenting thereunto it was so ordered. Whereupon after hearing the said district attorney in behalf of the State and the said Geo. D. Van Dyke in behalf of the accused defendant, Albert Huegin, the court ordered that said demurrer of the State to said special plea in bar be and the same was sustained, to which ruling the said accused defendant Albert Huegin then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Albert Huegin declared that he stood upon said plea and did not desire to plead over. The court then found the said accused defendant guilty as charged in the information and sentenced him to pay a fine of one hundred and fifty dollars together with sixty-seven and 10/100 dol-
91 lars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for Milwaukee county, until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said accused defendant Albert Huegin then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Albert Huegin, in the cause aforesaid.

Dated November 25th, A. D. 1901.

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff, *v.* Albert Huegin, defendant. Bill of exceptions. Van Dyke & Van Dyke & Carter, room 112 New Insurance building, Milwaukee, Wisconsin, attorneys for defendant, Albert Huegin. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

91½ In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
ANDREW J. AIKENS, ALBERT HUEGIN, and MELVIN A. HOYT, Defendants.

To W. H. Bennett, Esq., district attorney:

You will please take notice that Albert Huegin, one of the defendants in the above-entitled action has this day filed with the clerk of the above-named court a writ of error from the supreme court of the State of Wisconsin in the above-entitled action, and a full, true and complete copy of said writ of error is hereto attached.

Dated Milwaukee, November 26th, 1901.

Yours, etc., GEO. D. VAN DYKE,
Attorney for Albert Huegin, Defendant.

92 STATE OF WISCONSIN, } ss:
Supreme Court, }

The State of Wisconsin to the judge of the municipal court of the county of Milwaukee, in said State, Greeting:

Because, in the record and proceedings, and also in the renditio of judgment, in a suit which was duly tried in the municipa court of Milwaukee county aforesaid, before you, between The Stat of Wisconsin plaintiff, and Andrew J. Aikens, Albert Huegin an Melvin A. Hoyt, defendants, in a criminal prosecution for misd meanor manifest error hath intervened to the great damage of th said Albert Huegin, as by his complaint we are informed.

And we being willing that the error, if any there be, should i due manner be corrected and full and speedy justice done to th parties aforesaid, do command you, that if judgment be thereupo given, then you send to the judges of the supreme court of the Stat of Wisconsin, distinctly and openly, under your seal, with all con venient dispatch, a transcript of the record and proceedings of th suit aforesaid, with all things concerning the same and this writ, s that they may have the same at the next term of our said supreme court, to be held at Madison, in the State aforesaid, on the Tuesda next preceding the second Wednesday in January anno Domini on thousand nine hundred and two that the record and proceeding aforesaid being inspected, we may cause further to be done, for co recting that error, what of right, and according to law and th rules of our said court, ought to be done.

Witness, the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, at Madison, this twenty-sixth day o November, A. D. 1901.

Attest:

[SEAL.] CLARENCE KELLOGG, *Clerk.*

93 (Endorsements:) Municipal court, Milwaukee county State of Wisconsin, plaintiff, *v.* A. J. Aikens *et al.*, defendant

Notice of filing writ of error. Due service of the within notice admitted this 26th day of November, A. D. 1901. W. H. Bennett, district att'y and att'y for plaintiff. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court.

94 State of Wisconsin, Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT, ANDREW J. AIKENS, and ALBERT HUEGIN, Defendants.

And the said Melvin A. Hoyt separately and in his own proper person, cometh into court here, and having heard the information read, saith, that the said information, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same; and in addition thereto this defendant alleges the following special objections to the said information, to wit:

(1.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the other defendants named in the said information, were such conspiracies, combinations, confederations, associations, agreements and understandings as this defendant and the said other defendants had a lawful right to make and enter into as forming a part of their legitimate trade and competition between the said defendants with the said Journal Company and its officers and stockholders in the lawful conduct of the business of this defendant and the said other defendants as publishers of the newspapers respectively conducted by the said defendants, and the said Journal Company.

(2.) That the several acts charged in the said information as having been performed by this defendant and the said other defendants, do not state any criminal offense known to the law, but such acts, and each and every of them, were lawful and legitimate acts of competition in trade such as this defendant and said other
95 defendants had lawful right to perform in the law.

(3.) That the said several alleged conspiracies, combinations, confederations, associations, agreements and mutual understandings had between this defendant and the said other defendants, Andrew J. Aikens and Albert Huegin, were such conspiracies, combinations, associations, agreements and mutual understandings as this defendant and the said other defendants, as citizens of the United States and the State of Wisconsin, had lawful right to make and enter into in the conduct and management of the said several newspapers so published by this defendant and the said other defendants, Andrew J. Aikens and the said Albert Huegin respectively, under the Constitution and laws of the United States, and especially under and by virtue of the provisions of article XIV of

the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(4.) That the several acts charged therein, as having been done and performed by this defendant and the said other defendants, Andrew J. Aikens and Albert Huegin in furtherance of the said alleged several conspiracies, combinations, confederations, associations, agreements and mutual understandings between this defendant and the said other defendants, were severally and respectively such acts as this defendant and the said other defendants had lawful right to do and perform as citizens of the United States and of the State of Wisconsin, as lawful and legitimate conspiracies, combinations, confederations, associations, agreements and mutual understandings, in the conduct of the business of this defendant and the publication of his said newspaper, and that of the newspapers of said other defendants, and in the publication of the said newspapers published by them respectively, and that such acts were innocent acts and lawful acts of competition in the trade and business of this defendant and in the trade and business of the said other de-
96 fendants, under the Constitution and laws of the United States and especially under the provisions of article XIV of the amendments to the Constitution of the United States, and this defendant claims the protection thereof.

(5.) And because the said information does not state any fact or facts which constitute a criminal offense known to the laws of the State of Wisconsin, but the acts so charged were and are legitimate acts of trade and competition such as any citizen of said State might lawfully employ in the conduct of his business; and this he is ready to verify.

Wherefore, for want of a sufficient information in this behalf, the said Melvin A. Hoyt prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said information specified.

NEWTON P. MURPHEY,
Attorney for Melvin A. Hoyt, One of the Defendants.

(Endorsements:) State of Wisconsin, municipal court, Milwaukee county. State of Wisconsin, plaintiff, *v.* Melvin A. Hoyt, Andrew J. Aikens and Albert Huegin, defendants. Demurrer of def't Hoyt. Filed Oct. 21st, 1901. Frank E. Woller, clerk of municipal court. N. S. Murphey, att'y for def't Hoyt.

97 In Municipal Court, Milwaukee County.

STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT ET AL., Defendants.

This case coming on on November 20th, A. D. 1901, at the then current term of said court, Hon. George W. Burnell, judge presiding, he having been called in by Judge A. C. Brazee, who had heretofore acted for the State in this matter; and the defendant, Melvin A.

Hoyt, having filed and served a demurrer to the information filed herein, and the court having overruled said demurrer, to which ruling the said Melvin A. Hoyt then and there duly excepted, said exception is hereby allowed, and the said Melvin A. Hoyt thereupon declared in open court that he stood upon said demurrer, and the court thereupon found said Melvin A. Hoyt guilty as charged in the information, and sentenced him to pay a fine of one hundred and fifty dollars together with $67.10, one-third of the costs of prosecution, and that in default of the payment of such fine and costs the said Melvin A. Hoyt be committed to the House of Correction for Milwaukee county until such fine and costs are paid, not to exceed 30 days, to which judgment the said Melvin A. Hoyt duly excepted, and the exception is hereby allowed. And thereupon the said Melvin A. Hoyt asked for a stay of proceedings until the return of and filing of the remittitur finally in this cause, for the purpose of enabling him to review said judgment by writ of error under and pursuant to sections 4720 and 4722 of the Revised Statutes, which stay of proceedings is hereby granted, provided that the said Melvin A. Hoyt recognize to the State of Wisconsin in the sum of $500.00, with sufficient sureties for his personal appearance
98 at the supreme court at the next term thereof, to then enter and prosecute his said exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior. Recognizance offered and filed and sureties approved.

Dated this 20th day of November, A. D. 1901.

By the court,

GEO. W. BURNELL,
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. State of Wisconsin *v.* Melvin A. Hoyt *et al.* Exceptions. N. S. Murphey, attorney for Melvin A. Hoyt. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

99 STATE OF WISCONSIN, } *ss*:
Milwaukee County, }

In the Municipal Court of the County of Milwaukee.

We, Melvin A. Hoyt, Frederick Seibel and George Brumder, of the county of Milwaukee, acknowledge ourselves to be indebted to the State of Wisconsin in the sum of five hundred dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the following condition, to wit:

The condition of this recognizance is such that, whereas, the said Melvin A. Hoyt was, on the 20th day of November, A. D. 1901, convicted before the municipal court of the county of Milwaukee, of the offense of conspiracy to injure and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at sixty-seven and $\frac{10}{100}$ dollars, and to be committed to the House of Correction of said county,

until such fine and costs are paid or discharged, such imprisonment not to exceed thirty days; and whereas, the said Melvin A. Hoyt has presented exceptions under R. S. section 7220 which were allowed preparatory to suing out a writ of error from the judgment of said municipal court rendered thereon, to the supreme court of the State of Wisconsin;

Now, therefore, if the said Melvin A. Hoyt shall personally appear in said supreme court of the State of Wisconsin, on the first day of the next regular term of said court, and from time to time thereafter until discharged by law, and to enter and prosecute his exceptions with effect, and abide the sentence of the court thereon, and in the meantime keep the peace and be of good behavior, then this recognizance to be void, otherwise of force.

Dated, Milwaukee, this 20th day of November, 1901.

MELVIN A. HOYT.
FRITZ SEIBEL.
GEO. BRUMDER.

100 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Fred Seibel and Geo. Brunder, the sureties above named, being severally duly sworn, each for himself on oath, says that he owns and possesses unincumbered real estate, within this State, not exempt from sale on execution, worth at least the sum of one thousand dollars.

FRITZ SEIBEL.
GEO. BRUMDER.

Subscribed and sworn to before me, this 20th day of November, A. D. 1901.

THOS. V. DALLY,
Deputy Clerk of the Municipal Court.

Approved Nov. 20, 1901.
FRANK E. WOLLER,
Clerk of the Municipal Court.

(Endorsements:) State of Wisconsin, Milwaukee county. Municipal court, county of Milwaukee. The State of Wisconsin against Melvin A. Hoyt *et al.* Recognizance for appeal. Approved as to form and sufficiency of sureties, this 20th day of November, 1901. Geo. W. Burnell, judge. Filed Nov. 20, 1901. Frank E. Woller, clerk of municipal court.

01 STATE OF WISCONSIN:

In Municipal Court, Milwaukee County.

THE STATE OF WISCONSIN, Plaintiff,
vs.
MELVIN A. HOYT ET AL., Defendants.

At a regular term of said court holden on November 20th, A. D. 1901, Honorable George W. Burnell judge presiding, who *having* been called in by Judge A. C. Brazee for the reason that the latter judge was disqualified to try said cause, having heretofore acted for the said State in this matter, as district attorney for the county of Milwaukee, the State of Wisconsin appearing by W. H. Bennett, district attorney of Milwaukee county, and the accused defendant Melvin A. Hoyt aforesaid appearing by Newton S. Murphey, his attorney, *and* the following proceedings were had: The said cause coming on to be heard upon the demurrer heretofore filed by the said defendant Melvin A. Hoyt to the information filed herein by said district attorney, and after hearing the said district attorney for the State in opposition to the said demurrer, and the defendant Melvin A. Hoyt by his said attorney in support thereof, and the court being advised in the premises, whereupon the court ordered that the said demurrer of the said defendant Melvin A. Hoyt be and the same was thereby overruled, to which ruling the said defendant Melvin A. Hoyt then and there duly excepted, which exception was reduced to writing and then and there allowed, whereupon the said accused defendant Melvin A. Hoyt declared that he stood upon said demurrer and did not desire to plead over. The court thereupon found the said defendant Melvin A. Hoyt guilty as charged in the information and sentenced him to — a fine of one hundred and fifty dollars, together with sixty-seven and 10/100 dollars costs, being one-third of the whole cost of this proceeding, and in default of such payment be committed to the House of Correction for
102 Milwaukee county until such fine and costs are paid, not, however, in all exceeding thirty days. Whereupon the said defendant Melvin A. Hoyt then and there duly tendered his exception to said finding and judgment of conviction, which exception was reduced to writing and allowed; and in order that said proceedings had may more certainly appear of record in this cause the foregoing is by consent of both parties this day signed, sealed and certified by me as and for a bill of exceptions on the part of the said accused defendant Melvin A. Hoyt in the cause aforesaid.

Dated November 23rd, A. D. 1901.

GEORGE W. BURNELL, [SEAL.]
Judge Presiding.

(Endorsements:) Municipal court, Milwaukee county. The State of Wisconsin, plaintiff, *v.* Melvin A. Hoyt *et al.*, defendants. Bill of exceptions. We consent that Judge Burnell may sign and seal within as bill of exceptions in above cause. Nov. 22, 1901. W. H.

Bennett, dist. at'ty Mil. Co., Wis. Newton S. Murphey, att'y for def't Melvin A. Hoyt. Filed Nov. 26, 1901. Frank E. Woller, clerk of municipal court. Newton S. Murphey, att'y for def't Melvin A. Hoyt.

103 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that I have compared the foregoing copies with the original capias, information for conspiracy, plea of A. J. Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens, plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing writ of error of defendant, Albert Huegin; demurrer of defendant Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, entered in the action therein entitled, that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 4th day of December, A. D. 1901.

[SEAL.] FRANK E. WOLLER,
Clerk of the Municipal Court.

104 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that pursuant to the command of the annexed writ of error, I herewith transmit to the supreme court of the State of Wisconsin, certified copies of all of the original papers filed in the therein-entitled action, together with a certified copy of the original record entered in said action, and I further certify that the foregoing are certified copies of all said original papers, being the original capias, information for conspiracy, plea of A. J. Aikens, order setting case for trial, notice of time of hearing, affidavit and notice of motion to strike out plea of A. J. Aikens, affidavit and notice of motion to strike out plea of A. J. Aikens, exceptions of defendant, A. J. Aikens, recognizance of A. J. Aikens, bill of exceptions of A. J. Aikens, notice of filing writ of error of A. J. Aikens; plea of Albert Huegin, affidavit and notice of motion to strike out special plea of Albert Huegin, affidavit and notice of motion to

strike out special plea of Albert Huegin, exceptions of defendant, Albert Huegin, recognizance of defendant, Albert Huegin, bill of exceptions of defendant, Albert Huegin, notice of filing of writ of error of defendant, Albert Huegin; demurrer of defendant Melvin A. Hoyt, exceptions of defendant, Melvin A. Hoyt, recognizance of defendant, Melvin A. Hoyt, bill of exceptions of defendant, Melvin A. Hoyt, together with all endorsements on each and every of the foregoing, filed and entered in the action therein entitled and of record in my office.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court this 4th day of December, A. D. 1901.

FRANK E. WOLLER,
Clerk of the Municipal Court.

105 STATE OF WISCONSIN, } ss:
Municipal Court, Milwaukee County, }

I, Frank E. Woller, clerk of the municipal court of Milwaukee county, do hereby certify that the foregoing words "*at hard labor,*" where they appear in the original return, were erased by me so that said return would conform to the judgment and sentence of the court.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court this 7th day of February, A. D. 1902.

FRANK E. WOLLER,
Clerk of the Municipal Court.

106 And afterwards, to wit: on the first day of February, A. D. 1902, the same being the thirteenth day of said term, the following proceedings were had in this court, in said cause, that is to say:

Milwaukee Municipal Court.

MELVIN A. HOYT, Plaintiff in Error, }
vs.
STATE OF WISCONSIN, Defendant in Error. }

And now at this day came the parties herein by their attorneys and submitted this cause to the court on case and briefs, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

107 And afterwards, to wit: on the eighteenth day of February, A. D. 1902, the same being the fourteenth day of said term, judgment was rendered in said cause, by this court, in the words and figures following, that is to say:

Milwaukee Municipal Court.

MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.
} Opinion by Justice Marshall.

This cause came on to be heard on the return to the writ of error issued herein, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the municipal court of Milwaukee county, in this cause, be and the same is hereby affirmed, with costs against the said plaintiff in error taxed at the sum of — dollars.

Justice Dodge took no part.

1860 And afterwards, to wit: on the fifth day of February, A. D. 1861, a stipulation was filed in this court, in this cause, in the words and figures following, that is to say:

Supreme Court.

STATE OF WISCONSIN, Defendant in Error,
vs.
MELVIN A. HOYT ET AL., Plaintiffs in Error.

It is hereby agreed between the above-named defendant in error and Melvin A. Hoyt, one of the plaintiffs in error, as follows:

Whereas it appears from the record returned by the clerk of the municipal court of Milwaukee county to the writ of error issued from this court in the case of State of Wisconsin v. the said Melvin A. Hoyt, that there is a contradiction in the same as follows: To judgment of the municipal court against the said Melvin it is adjudged that he shall pay a certain fine and certain costs of suit and that in default of such payment he be confined in the House of Correction of Milwaukee county until said fine and costs are paid in all not exceeding 30 days; and it further appearing from the return of the clerk of said municipal court to the said writ of error that the said judgment imposed the fine and costs above stated and that in default of such payment the said Melvin A. Hoyt should be imprisoned in the House of Correction of Milwaukee county "a term below" until such fine and costs were paid not exceeding 30 days in all. And,

Whereas the said judgment and the return of the said clerk are contradictory of each other in respect to the said "term below" provided by said clerk to be imposed upon the said Hoyt.

1860 Now therefore it is agreed that the record in the said cause may be remanded further to the clerk of the municipal court of Milwaukee county with directions to correct his said certificate to this court so as to conform to the judgment and

by the said municipal court or otherwise in conformity with the directions of the judge of said municipal court.

Dated Feb. 6, 1902.

BY THE COURT.

[illegible]
Att'y Gen'l, for Defendant in Error.

[illegible]
Attorney for Plaintiff in Error.

[Endorsed:] Supreme court. State of Wisconsin, def't in error, vs. Edwin C. Bream et al., pl'ffs in error. Stipulation. Filed Feb. 7, 1902. Clarence Kellogg, clerk of supreme court. W. J. C. Kingsley, att'y for Edwin C. Bream et al., pl'ffs in error.

And thereupon, this court, by Justice Marshall, filed its opinion in said cause, in the words and figures following, that is to say:

Nos. 1, 2, and 3. State

STATE OF WISCONSIN:

In Supreme Court.

Edwin C. Bream, Plaintiff in Error, }
vs.
State of Wisconsin, Defendant in Error. }

Clarence Kellogg, Plaintiff in Error, }
vs.
State of Wisconsin, Defendant in Error. }

Edwin C. Bream, Plaintiff in Error, }
vs.
State of Wisconsin, Defendant in Error. }

Each of the plaintiffs in error and on his proper motion was brought before the municipal court of Milwaukee county, charged with the guilt of having committed an offense in violation of section 4600a, R. S. 1898, as charged in the information. The substance of the complaint upon which the plaintiffs in error were originally charged and brought before a magistrate for their preliminary examination, and the constitutionality of sec. 4600a of said statutes as construed by this court and sustained on a review of [illegible] upon [illegible] 112 Wis. p. 178. On said review there was no question but that the complaint fully satisfied the statute. It was discharged and the cases [illegible] as constitutional grounds. [illegible] the cases were remanded for further proceedings according to law. Thereupon an information was duly filed charging the accused [illegible] substantially as in the complaint, which has been passed upon as aforesaid.

Upon being duly arraigned upon such information, [illegible] Bream and Edwin Kingsley separately filed pleas attacking the

charge made against them, but insisting that the same did not constitute a criminal offense, assigning in support thereof the same reasons as those formerly urged and passed upon by this court as aforesaid. Melvin A. Hoyt, being duly arraigned upon the information, took the same course as his associates by demurring to such information. The special pleas and the demurrer to the information were overruled. The plaintiffs in error thereupon, each in his own behalf, refused to plead over to the information, admitted all the allegations thereof, but insisted that the acts charged do not constitute a punishable offense. Thereupon the plaintiffs in error were severally adjudged guilty as charged in the information, and punishment therefor was duly imposed by the judgment of the court. Thereupon these writs of error were sued out to review such judgments.

MARSHALL, *J.*:

From the foregoing statement it appears that all the questions raised in the court below by plaintiffs in error were considered and decided against them in State *v.* Aikens, State *v.* Huegin, and State *v.* Hoyt, 110 Wis., 189. The trial court followed that decision as it was bound to do. As we understand the matter the information
113 contains the same charge as the one set forth in the complaint, the plaintiffs in error in effect pleaded guilty thereto, admitting the doing of all the acts charged against them, and they were thereupon duly adjudged guilty and sentenced. In that view the judgments must be affirmed, as all questions in regard to the matters are *res adjudicata*, as before indicated.

By the COURT: The judgment as to each of the plaintiffs in error is affirmed.

114 MELVIN A. HOYT, Plaintiff in Error,
vs.
STATE OF WISCONSIN, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above-entitled cause.

That the original writ of error, the petition therefor, the citation with its service endorsed thereon, the assignment of errors and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this 7th day of April, 1902.

Seal Supreme Court of Wisconsin.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

115 Supreme Court of the United States.

STATE OF WISCONSIN, Defendant in Error,
vs.
MELVIN A. HOYT, Plaintiff in Error.

Of the October term in the year of our Lord one thousand nine hundred and one.

Afterwards to wit, on the eleventh day of April in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Melvin A. Hoyt, by Newton S. Murphey his attorney, and says that in the record and proceedings aforesaid, there is manifest error, in this to wit,—

First. In the affirmance by the supreme court of the State of Wisconsin, of the judgment and findings of the municipal court of the county of Milwaukee in the said State, adjudging the said Melvin A. Hoyt, plaintiff in error, guilty of a conspiracy as charged in the information filed in the said last-named court, and in imposing a fine and sentence in pursuance thereof upon him the said Melvin A. Hoyt.

Second. And in the holding and judgment of the said supreme court of the State of Wisconsin, that the several, or any of the acts charged in the said information to have been performed or done by the said Melvin A. Hoyt, or agreed to be done or performed by the said Melvin A. Hoyt singly, or in combination with Andrew J. Aikens and Albert Huegen the said coplaintiffs in error with said Melvin A. Hoyt, or either of them, were criminal, unlawful, or prohibited combinations or acts in the law.

116 Third. And the said supreme court of the State of Wisconsin further erred in its said judgment by holding and adjudging that the provisions of article XIV of the amendments to the Constitution of the United States, though a construction of said article XIV was thereby necessarily drawn in question in such adjudication, was not a protection in the law, of the said Melvin A. Hoyt, against any combination, act, or acts, charged in the said information to have been done, or agreed to be done, by the said Melvin A. Hoyt, either singly, or in combination with the said Andrew J. Aikens and Albert Huegen, or either of them; whereby, and by reason of such erroneous holding and judgment of the said supreme court of the State of Wisconsin, the said Melvin A. Hoyt, was deprived of the rights, privileges, and immunities, secured to him by the said article XIV of the amendments to the Constitution of the United States, and of the liberty, property, and due process of law secured to him as a citizen of the United States and of the State of Wisconsin.

Fourth. And though the validity of section 4466a of Sanborn & Berryman's edition of the Revised Statutes of the State of Wisconsin for the year A. D. 1898, was necessarily drawn in question, in the aforesaid judgment of the said supreme court of the State of Wisconsin, as being repugnant to the Constitution of the United States

and especially to the said article XIV of the amendments to the said Constitution, the said supreme court of the State of Wisconsin further erred in its said judgment in sustaining the validity of the said statute, and by holding, as it did hold, the same, a valid enactment; whereby the said Melvin A. Hoyt was deprived of his rights, privileges, and immunities, as a citizen of the United States, and of the State of Wisconsin, and of the liberty, property, and due process of law, secured to him by the said article XIV of the amendments to the Constitution of the United States.

117 And the said Melvin A. Hoyt prays that the judgment aforesaid, may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

NEWTON S. MURPHEY,
Attorney for Plaintiff in Error, Melvin A. Hoyt.

118 [Endorsed:] Supreme Court of the United States. State of Wisconsin, defendant in error, *vs.* Melvin A. Hoyt, plaintiff in error. Assignment of errors. Original. Sir: You will take notice that the within assignment of errors in the above case will be filed with the clerk of said court at Washington D. C. May 12 1902 Newton S. Murphey att'y for pl'ff in error. To E. R. Hicks att'y gen'l, att'y for defendant in error. May 9 1902. Newton S. Murphey, attorney for plaintiff in error, Melvin A. Hoyt. Served May 9 1902

119 [Endorsed:] File No. 18,487. Supreme Court U. S. October term, 1901 Term No. 634. Melvin A. Hoyt, pl'ff in error, *vs.* The State of Wisconsin. Assignment of errors. Filed May 12th, 1902

Endorsed on cover: File No. 18,487. Wisconsin supreme court. Term No. 299 Melvin A. Hoyt, plaintiff in error, *vs.* The State of Wisconsin. Filed April 11th, 1902.

Supreme Court U.S.
FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk

Motion to advance.

Filed Nov. 14, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Number 227.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

STATE OF WISCONSIN,
DEFENDANT IN ERROR.

MOTION TO ADVANCE CAUSE.

W. H. TIMLIN,
Counsel for Plaintiff in Error, Andrew J. Aikens.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Number 297.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

STATE OF WISCONSIN,
DEFENDANT IN ERROR.

MOTION TO ADVANCE CAUSE.

The plaintiff in error, in the cause above entitled, Andrew J. Aikens, respectfully moves this Court upon the printed record and the briefs of said plaintiff in error on file in this Court, to advance said cause above entitled on the present calendar of this Court.

MATTER INVOLVED.

There is involved only the determination of the sufficiency of a plea in bar interposed by said plaintiff in error to an information in a criminal prosecution in the courts of Wisconsin. The information was for conspiracy and is set forth in full beginning at page 16 of the printed record in this Court, and summed up briefly charges the defendant with conspiring with others to injure a cer-

tain corporation in its trade or business by offering advantages to other persons to trade with the plaintiff in error. (pp. 7 to 11, brief for plaintiff in error.) The plea (printed Record, p. 19) admitted all the averments of fact except those relating to intention and justified on the ground, briefly stated, that the acts complained of were lawful acts of trade competition which the plaintiff in error was entitled to do, under Article XIV of the Constitution of the United States, notwithstanding any state statute or law to the contrary. (Printed Record, pp. 19 to 22); (Brief of plaintiff in error, pp. 7 to 11.)

REASONS FOR THE APPLICATION.

1. This is a criminal case within the meaning of subdivision 3, Rule 26 of this Court, and the plaintiff in error is under sentence to fine and imprisonment, and the said plaintiff in error ought to be entitled to a speedy hearing and disposition of the charge against him and not compelled, if innocent, to stand in the community in the position of a convicted person.

2. This is a writ of error to the Supreme Court of the state of Wisconsin and the questions arising on such plea are of great public interest.

Respectfully submitted,

W. H. TIMLIN,

Counsel for Andrew J. Aikens.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1902.

Number 297.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

STATE OF WISCONSIN,
Defendant in Error.

To Honorable E. R. Hicks, Attorney General, for Defendant in Error.

PLEASE TAKE NOTICE that on the printed record and the brief for plaintiff in error heretofore served on you and both on file in the office of the clerk of the Court aforesaid, and on the annexed motion papers the plaintiff in error will move the said Court on the 17th day of November, A. D. 1902, at the opening of Court upon that day, or as soon thereafter as counsel can be heard, to advance said cause on the present calendar of said Court for hearing to within as short a time after said motion day as said court can set the same.

Yours, &c.,

W. H. TIMLIN,
Counsel for Plaintiff in Error.

No. 298

Motion to advance

FILED
NOV 14 1902
JAMES H. MCKENNEY,
Clerk.

Filed Nov. 14, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 298.

ALBERT HUBBIN,
Plaintiff in Error,

vs.

STATE OF WISCONSIN,
Defendant in Error.

MOTION TO ADVANCE CAUSE.

Cyrus D. Van Dyke,
Counsel for Plaintiff in Error, Albert Hubbin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Number 298.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

STATE OF WISCONSIN,
DEFENDANT IN ERROR.

MOTION TO ADVANCE CAUSE.

The plaintiff in error, in the cause above entitled, Albert Huegin, respectfully moves this Court upon the printed record and the briefs of said plaintiff in error on file in this Court, to advance said cause above entitled on the present calendar of this Court.

MATTER INVOLVED.

There is involved only the determination of the sufficiency of a plea in bar interposed by said plaintiff in error to an information in a criminal prosecution in the courts of Wisconsin. The information was for conspiracy and is set forth in full beginning at page 16 of the printed record in this Court, and summed up briefly charges the defendant with conspiring with others to injure a cer-

tain corporation in its trade or business by offering advantages to other persons to trade with the plaintiff in error. (pp. 7 to 11, brief for plaintiff in error.) The plea (printed Record, p. 19) admitted all the averments of fact except those relating to intention and justified on the ground, briefly stated, that the acts complained of were lawful acts of trade competition which the plaintiff in error was entitled to do, under Article XIV of the Constitution of the United States, notwithstanding any state statute or law to the contrary. (Printed Record, pp. 19 to 22); (Brief of plaintiff in error, pp. 7 to 11.)

REASONS FOR THE APPLICATION.

1. This is a criminal case within the meaning of subdivision 3, Rule 26 of this Court, and the plaintiff in error is under sentence to fine and imprisonment, and the said plaintiff in error ought to be entitled to a speedy hearing and disposition of the charge against him and not compelled, if innocent, to stand in the community in the position of a convicted person.

2. This is a writ of error to the Supreme Court of the state of Wisconsin and the questions arising on such plea are of great public interest.

Respectfully submitted,

GEORGE D. VAN DYKE,

Counsel for Albert Huegin.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1902.

Number 298.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

STATE OF WISCONSIN,
Defendant in Error.

To Honorable E. R. Hicks, Attorney General, for Defendant in Error.

PLEASE TAKE NOTICE that on the printed record and the brief for plaintiff in error heretofore served on you and both on file in the office of the clerk of the Court aforesaid, and on the annexed motion papers the plaintiff in error will move the said Court on the 17th day of November, A. D. 1902, at the opening of Court upon that day, or as soon thereafter as counsel can be heard, to advance said cause on the present calendar of said Court for hearing to within as short a time after said motion day as said court can set the same.

Yours, &c.,

GEORGE D. VAN DYKE,
Counsel for Plaintiff in Error.

PLAINTIFF'S BRIEF

Supreme Court U. S.
FILED
SEP 16 1903
CLERK
Clerk.

Term, 1903.

SUPREME COURT OF THE UNITED STATES.

[redacted]

[redacted]

ALBERT BURGESS,

[redacted]

[redacted]

THE STATE OF WISCONSIN,

[redacted]

[redacted]

THE STATE OF WISCONSIN,

[redacted]

BRIEF FOR PLAINTIFFS IN ERROR.

[redacted]

[redacted]

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1902.

Nos. 298 and 297.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

MAY IT PLEASE THE COURT:

A writ of error was sued out of this Court by each of the plaintiffs in error above named, directed to the Supreme Court of the State of Wisconsin, to review the final judgment of that Court affirming the judgment of the Municipal Court of Milwaukee County, Wisconsin, which adjudged the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt guilty of having committed a misdemeanor, as charged in the information, to-wit: conspiracy to injure another in his trade or business under Section 4466a of the

Statutes of Wisconsin of 1898, and sentenced each of them to pay a fine with costs, and in default of payment to be committed to the House of Correction of Milwaukee County at hard labor until such fine and costs were paid, not, however, to exceed thirty days.

STATEMENT.

I. Section 4466a, Statutes of Wisconsin of 1898, provided as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the purpose "of wilfully or maliciously *injuring another in his reputation, "trade, business or profession by any means whatever*, or for the "purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

II. October 1st, 1901, an information (printed record, p. 16) was filed in the Municipal Court of Milwaukee County, Wisconsin, which attempted to set up an offense under the above statute. Reduced to its simplest form, the information, in substance, charged that the accused, viz.: the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt, each of whom was the business manager of a daily newspaper published in the City of Milwaukee, in said county, respectively named the Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, for the purpose and with the intent of wilfully, maliciously and unlawfully injuring the Journal Company (which was a corporation engaged in publishing another daily newspaper in said city, viz.: The Milwaukee Journal) *in its trade and business*, and also Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum (who were stockholders and officers of The Journal

Company), and each of them, in their trade and business; had combined together and agreed that if any person advertising or proposing to advertise in The Milwaukee Journal should pay The Journal Company an increased rate then recently established or fixed by it, then and in that case any such person should not be permitted to advertise in any of the other three newspapers, to-wit: The Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, unless such person should advertise in each of said three papers and should pay to each of them an increase equal to the said recent increase of the Journal's rates over the rates theretofore charged by said three papers respectively; but that in case any person should refuse to pay to The Journal Company its increased rate, then such person should be at liberty to advertise in either or all of the other three papers at the rates which had theretofore been charged by them respectively; and further charged, in substance, that in pursuance of said agreement advertisers had been notified of said agreement and had been induced to withdraw their advertisements from The Milwaukee Journal, and other advertisers had been prevented from advertising therein, all to the injury of The Journal Company.

III. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, each interposed a separate special plea in bar (printed record, p. 19.) These pleas are exactly alike and are in the nature of pleas in confession and avoidance, a precedent for which is found in *Rex vs. Kilderby,* 1 Saunders, 308, cited 1 Chitty Crim. Law, 472.

They admit the agreement and acts in pursuance thereof, as alleged in the information, and while they assert that the intent was to injure The Journal Company, they do not admit that their acts were either malicious or unlawful, but on the contrary they allege "that those acts, intentions, agreements and combinations were done, harbored, made and entered into in *trade competition,* and that such acts, intentions, agreements

and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," and as free men and citizens of the United States and of the State of Wisconsin and as competitors in business with The Journal Company they claimed immunity therefor under Article XIV of the Constitution of the United States, notwithstanding any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary.

IV. The prosecution moved to strike out the special pleas above mentioned, which motions were denied, and thereupon asked that said motions might stand and be considered as demurrers to such special pleas, and the accused consenting thereto it was so ordered. After a hearing the demurrers to said special pleas were sustained, and the accused having elected to stand on their said pleas, were found guilty thereon, as charged in the information, and sentenced as above mentioned.

V. Upon writ of error the Supreme Court of the State of Wisconsin affirmed this judgment (printed record, p. 52), and to review the latter judgment this writ of error was sued out.

VI. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, have each filed assignments of error upon which they rely to reverse said judgment. They are alike, and in substance are as follows (printed record, p. 9.):

(1) The Court erred in sustaining the demurrers interposed by the State of Wisconsin to the pleas filed by the accused, and by holding and deciding that the facts stated in said pleas were not sufficient to constitute a defense to the matters and things charged in the information.

(2) The Court erred in determining that the pleas filed by the accused were not a sufficient justification and defense under

the XIVth amendment of the Constitution of the United States.

(3) The Court erred in sustaining the demurrers of the State of Wisconsin to the pleas of the accused and in not determining upon said pleas that the information was insufficient in law.

(4) The Court erred in adjudging the accused guilty on the record before it, viz.: said information and pleas, and sentencing them to fine and imprisonment and affirming the judgment of the trial court in that regard, for the reason that said record shows that said sentence and conviction were in violation of the rights of said accused under the XIVth amendment of the Constitution of the United States, in that it deprived them of the use of their property without due process of law, and in that it deprived them of the liberty guaranteed them by said XIVth amendment to make contracts not inimical to public health, welfare or morals, and in that it deprived the said accused of their liberty and abridged the privileges and immunities of said accused as citizens of the United States, and denied to them the equal protection of the law.

VII. Melvin A. Hoyt, above mentioned, demurred to the information; his demurrer was overruled, and standing on his demurrer he was found guilty, as charged in the information, and he was sentenced in the same manner. Upon writ of error the Supreme Court of Wisconsin affirmed this judgment, and to review this latter judgment he has sued out his writ of error.

ARGUMENT.

The precise question presented is this: Does Section 4466a, Wisconsin statutes of 1898, as interpreted and applied by the Wisconsin Supreme Court, deprive the accused of their liberty or property in violation of Section 1 of the fourteenth amendment of the Constitution of the United States?

It is settled that the constitutionality of a criminal statute

is to be tested not only by what has been declared criminal under it, but by what may be so declared; for a criminal statute cannot be used as a drag net to ensnare the guilty and innocent, leaving the latter to extricate themselves as they can.

Trade Mark Cases, 100 U. S., 82.

Montana Co. vs. St. Louis Co., 152 U. S., 170 op., citing *Stuart vs. Palmer,* 74 N. Y., 183.

In re Ah Jow, 29 Fed. Rep., 181.

If the Supreme Court of Wisconsin had limited the word "injuring" in this penal statute to mean the infraction of some legal right (11 *Am. & Eng. Encyc. of Law,* 1st ed., bot. p. 1, and cases), or had excepted acts of co-operation in trade competition from the purview of the statute in the decision now before this Court on writ of error, different questions might arise. But that Court did not do so. The question of the constitutionality of Section 4466a hereinbefore quoted must be determined in this Court upon the construction given to that statute by the Supreme Court of Wisconsin (*Machine Co. vs. Gage,* 100 U. S., 676), namely: that the statute is meant to prohibit intentional joint action of any kind, which joint action is intended to cause a loss of trade to another. This includes within the purview of the statute co-operation in trade competition. Thus construed we submit the statute is unconstitutional.

It is not difficult to instance cases of purely innocent acts which under this statute, as interpreted and applied, would be deemed criminal. A partnership agreement for the purpose of engaging in a trade which would invade the business field of another and injure him in his business by reducing the number of his customers would be an instance. Other instances of agreements made in trade competition which would fall within the condemnation of the statute are given in the cases following:

Steamship Co. vs. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 598; 1892 App. Cas., 35.

West Va. T. Co. vs. Standard Oil Co., 54 Cent. L. J., 246, and note; same case, 40 S. E. Rep., 591.

The foregoing case contains a very thorough discussion of the authorities:

Vegelahn vs. Guntner, 167 Mass., 92, and cases.
Guethler vs. Altman, 60 N. E. R., 355 (Ind.).

It is sufficient for the purposes of this case to confine our attention to the facts stated in the special pleas of the accused, the truth of which are admitted by the demurrers. They are, in substance, as follows:

A newspaper, The Milwaukee Journal, raised its advertising rate about 25 per cent. above its then existing rates. Three other newspapers, competitors with The Milwaukee Journal, refused to raise their advertising rates, and met their competitor's raise of rates by agreeing together that all advertisers who paid or agreed to pay The Milwaukee Journal its increased rates should have their advertisements accepted by the other three newspapers, in case they desired to advertise in any of the other three newspapers, only upon condition that they advertised in all the other three papers and paid to each a corresponding advance in rates. It will be observed that this agreement concerned property impressed by no public use; that it concerned only what private persons should do or refuse to do with their own private property; that no question of public health, morals or welfare was affected thereby; that it was done in the exercise of trade competition; that its object and purpose was to keep prices down; that it is impersonal in its aim and directed only against a policy; that it was done to injure a competitor by winning away its customers only in case it persisted in its attempt to raise prices. This result would naturally follow, for if it persisted in advancing its rates, advertisers desiring to advertise in one newspaper only could select any one of the three newspaers of the accused and avoid paying the advanced rate; advertisers desiring two newspapers could select two of the three newspapers of the accused paying the old rates instead of selecting The Milwaukee Journal and one of the newspapers of the accused, and so saving the advance of 25 per cent. on the rates of both; advertisers desiring to advertise in

three newspapers could select the three newspapers of the accused instead of The Milwaukee Journal and two of the newspapers of the accused and so save the advance of 25 per cent. in the rates of each; all advertisers desiring to advertise in four newspapers could of course use all four by paying each of the three newspapers of the accused the same rates as they paid The Milwaukee Journal.

It will also be observed that as the advertising trade is necessarily a limited one, the injury sustained by The Journal Company by a loss of customers was an advantage to the newspapers of the accused in so far as they could attract and secure such advertisers. And while the intent of the accused was to injure The Journal Company in the sense of trade competiton, the intent was also to benefit their own newspapers. The pleas admitted by the demurrers negative any malice or unlawful intent by showing the exercise of a legal right by accused; for malice or criminal intent will not be presumed where the act is consistent with legality.

West Va. T. Co. vs. Standard Oil Co., supra.

In this case the accused were adjudged guilty of an offence under the Wisconsin statute mentioned and sentence of fine or imprisonment imposed notwithstanding their claim of immunity for those acts on constitutional ground.

Aikens vs. State, 89 N. W. Rep., 1135.

Huegin vs. State, ibid.

State ex rel. Durner vs. Huegin, 110 Wis., 189.

In reading the opinion of the Supreme Court of Wisconsin in the *habeas corpus* proceedings (110 Wis., 189) this distinction should be borne in mind, namely: in the *habeas corpus* proceedings, in which the sufficiency of the complaint upon which the accused were originally brought before the examining magistrate was considered, the complaint, although it set out the facts, alleged generally a malicious and unlawful intent to injure, and did not show expressly, but left it to inference from the facts set forth that the acts complained of were done in

trade competition while the pleas, the truth of which is admitted by the demurrers, allege that the acts were done in trade competition and negative any unlawful intent.

The pleas therefore raise the additional question, namely: whether or not even if this statute is valid it makes criminal, acts of co-operation in trade competition without any intent to inflict injury other than the usual loss to a rival caused by successful competition.

If the words of the statute (Section 4466a, Wis. Statutes 1898) "Injuring another by any means whatever," as interpreted by the Supreme Court of Wisconsin, include within the term "injuring" a loss to business by trade competition and covers every act, whether lawful or unlawful in itself, which may prejudice another in his business as illustrated by the facts stated in the pleas in this case, the statute and the decisions of the Supreme Court sustaining it and so applying it deprives the citizen of the "liberty" of pursuing a lawful private calling and of the right of making contracts in respect thereto not injurious to the public welfare.

Niagara F. Ins. Co. vs. Cornell, 110 Fed., 816, 824.

Allgeyer vs. Louisiana, 165 U. S., 578; 17 Sup. Ct. Rep., 427.

Frisbie vs. U. S., 157 U. S., 160, 165; 15 Sup. Ct., 586.

Insurance Co. vs Cornell, 110 Fed., 816, 824 op. and cases cited.

Neither the statute (Sec. 4466a R. S. of Wis.) nor the decision sustaining it can be held as law, if subversive of these rights of the citizen, because the fourteenth section of the Federal Constitution applies to all agencies of state power, legislative, judicial and executive.

Chicago &c. R. R. Co. vs. Chicago, 166 U. S., 226; 17 Sup. Ct. R., 581.

Scott vs. McNeal, 154 U. S., 34; 14 Sup. Ct. R., 1108.

No question of public health, safety or morals is subserved by the statute, Section 4466a, nor by the decisions of the Wiscon-

sin Supreme Court in enforcing it under the facts stated in the pleas, consequently there can be no support for either under the police power of the state.

Lawton vs. Steele, 152 U. S., 133.

State vs. Dalton, 48 L. R. A., 775; same case, 22 R. I., 77.

State vs. Loomis, 21 L. R. A., 789 and note; same case, 115 Mo., 307.

It cannot be said that a statute has relation to the police power of the state when it is apparent from the statute that it has not, or when the statute, as interpreted by the State Court, goes away beyond the police power.

State vs. Santee, 53 L. R. A., 763, and cases in note; same case, 111 Iowa, 1.

Brannon's Fourteenth Amendment, pp. 480-491.

If association or combination for the purpose of trade competition were something not vital in trade and commerce, if the suppression of competitive combination did not strike at the life of economic association, and if a certain form of combination for competitive purposes were something which might be used as a cover for unlawful practices, the state might, under its police power, prohibit such form of combination. The prohibition in such case could be sustained under the rule of *Booth vs. The People,* 22 Sup. Ct. Rep., 425. But the state could not under the police power prohibit all association or joint action causing loss to another in business any more than it could prohibit all contracts in order to reach the evil mentioned in *Booth vs. The People, supra.* We submit the statute of Wisconsin hereinbefore quoted with the meaning given to it by the Supreme Court of Wisconsin in the decisions here for review, does prohibit all association for competitive purposes and consequently is the very kind of law which *Booth vs. The People, supra,* distinguishes as invalid and as infringement of rights secured by fundamental law. The statute as construed by the Court below prohibits all association for competitive purposes

because all such association is wilful and all such association is for the purpose of injuring another in his trade within this loose meaning of the word "injuring," and all such association is malicious if malice may be inferred from the act of offering inducements to win away customers or from the exercise of acts of competition either singly or by groups.

"Only through the principle of competition has political "economy any pretentions to the character of a science. A dic- "tum that has compressed into a sentence the economic systems "of Ricardo, James Mill, Senior, and McCulloch."

Modern Distributive Process, Clark & Giddings, 1888, p. 18.

In a book by Prof. C. H. Cooley of Ann Arbor, published also in the Proceedings of American Economic Association of 1899, pp. 78, 173, the author at page 109 states this evident truth:

"There is no clear dividing line between individual and "group competition. In a certain sense it may be said that "there is no individual competition since the competing per- "son always draws aid and comfort of one sort or another from "other persons. So far as man is social and not merely ani- "mal he is the center and in a manner the product of a complex "web of relations and influence from which he can in no way "be separated unless by death. By group, however, is ordinar- "ily intended in this connection a definite association with "distinct purposes and organization. One of the chief pur- "poses of the creation of such definite groups is to compete "more effectually."

And again, *ibid.*, p. 107:

"True freedom, healthy organization and the highest type "of competition inevitably go together. They are indeed va- "rious aspects of the same thing. Freedom is possible only "through open competition and through an organization that "promotes the highest development of each individual; the best "organization is not only the outcome of rational freedom and "just competition, but is also a means of securing these."

It requires no special learning as an economist to appreciate the truth that association, combination and joint action are necessary parts of the competitive system. Take the case at bar. The complainants themselves are associated together to acquire trade, win away customers and injure other competitors in their trade in all modes not involving the violation of property rights. They do this intentionally and for the purpose of injuring other competitors within this loose or popular meaning of the word "injuring." It is only by their joint action and endeavor that they are able to offer their advertising advantages to the public and to raise the rates. The information shows by fair inference, that the prosecutor, the Journal Company, is as guilty under this statute so construed as the accused. For did not its managers combine, associate and agree to raise its prices to the injury in their trade of those who might have to pay such increased prices? This demonstrates the absurdity of such a law. Under such a law the counsel for the accused are liable, for did they not combine, associate, etc., for the purpose of injuring another by some means whatever? This Court in consultation must associate, agree together and combine for the purpose of deciding this cause and thereby "injuring" someone in the sense of causing loss.

To re-state the foregoing argumentatively: all such association is necessarily wilful in the sense of intentional. All such association injures the other competitor in his trade by causing a loss or diminution therein. If the intention to win away trade and patronage from another is a "malicious" intention, all competition is "malicious." If such intention, being a mere intention to exercise a legal right, is not "malicious," then the plea in this case is good. But the decision below and the construction thereby given the statute in question is to the effect that the fact that the acts charged were done in the exercise of trade competition is no justification. This is the result of the latest decision to which the writ of error herein runs. In the first decision of the habeas corpus (110 Wis., 189) the State Supreme Court undertook to decide the motives of the parties in this competition and stated that the means adopted as

shown in the complaint (information) indicated that the motives of the accused were malicious because the accused could not be benefited by the means employed. This is a very patent error arising, perhaps, from lack of experience in trade competition. The winning away of customers by offering advantages is always a benefit to the trader who secures their patronage, provided the advantages offered are such that they still leave the trader a profit or a gain of some kind. But, as we said before, this distinction disappears from the decision of the State Supreme Court here for review because it is there held that the plea is insufficient conceding it to be true.

We contend that the decision in 110 Wis., *supra,* is also fundamentally wrong both in the conclusion that the accused could not be benefited by their association and in the proposition that a law could be valid which made group competition criminal if the mental state of the competitors exercising such right might be found by a Court or jury to be "malicious." "Any means whatever" includes lawful means and to hold that competition can only be exercised when not "malicious" is to prohibit competition.

We concede that this Court will not declare the statute in question with the construction given it by the Wisconsin Supreme Court contrary to the federal constitution unless this Court can say that the statute with such construction has no real or substantial relation to the public health, safety or morals, but is a clear, unmistakable infringement of the rights secured by fundamental law. Our contention is, however, that this statute and the decision of the Supreme Court of Wisconsin in the case at bar cannot be upheld under the broadest scope that can be given to the police power unless this Court is prepared to go to the extent of holding that all combination or co-operation of individuals, whether for competitive purposes or not, which is intended to affect any other established business by causing a loss of trade may be punished as a misdemeanor by the State legislature. This, however, asserts the power of the state to suppress co-operative competition and

combinations for trade purposes, such as partnership, and it also assumes that a power exists in the state to declare that offering advantages to win away trade or custom from another in the way of competition, when this is done by the co-operation of two or more, constitutes an "injury" or the infraction of a legal right of that other. What is this but declaring that all who have patronage shall retain it and no two or more shall associate for the purpose of winning it away? Such a law creates and perpetuates monopoly. It is destructive of competition because it forbids co-operative or group competition. It makes all trade and commerce criminal because it penalizes those acts which are indispensable to carrying on trade and commerce. As applied to trade combinations it practically deprives the citizen of the liberty of pursuing a lawful calling and making contracts in respect thereto. If it be asserted that association, combination and joint action may be employed for unlawful purposes detrimental to public weal and that therefore the legislature may suppress all such, we submit that this position is unsound. Writing may be used for forgery, printing for libel, engraving for counterfeiting, chemistry to aid in felonious poisoning, meetings of the people for treasonable plots, contracts as a cover for gambling, etc., etc., but it could not be claimed that the legislature might prohibit all writing, all printing, all engraving, all meetings of the people or all contracts. Competition may be carried on to the extent of ruining a rival by driving him out of trade and after this the survivors might raise the prices, but this would not justify the suppression of competition. Besides, in the case at bar the group competition is directed solely against a policy of the complainant and not against the complainant personally, it reaches only the raise of prices and ends when the raise of prices by the complainant ends. It takes advantage of that raise of prices by offering to the public inducements to trade with the accused instead of with the complainant at its higher prices. The limits of the police power must be determined in each case as the question arises as was said by this Court in *Allgeyer vs. Louisiana, supra.* We submit that the case at bar presents upon the

plea offered by the accused the question whether or not it is within the police power of a state to penalize all association for competitive purposes if the object of such association is to injure another in his trade by attracting and drawing off his customers.

When this case was before the Supreme Court of Wisconsin upon habeas corpus it presented a different question which may be stated as follows: Can the state in the exercise of its police power prohibit such association for competitive purposes whereby it is intended to injure another in his trade in all cases where it may be found that such competition is, as a matter of fact, malicious? To this, that Court returned an affirmative answer.

When this case was before the Supreme Court of Wisconsin the second time, the question presented by the plea was: Is it a justification that the combination was entered into and the acts charged were done by the accused in the exercise of trade competition.

To this that Court returned a negative answer.

Respectfully,

GEO. D. VAN DYKE,

Counsel for Plaintiff in Error, Albert Huegin.

W. H. TIMLIN,

Counsel for Plaintiff in Error, A. J. Aikens.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1

THE STATE OF WASHINGTON,
Plaintiff in Error,

vs.

THE STATE OF OREGON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY ARGUMENT.

W. H. Thiele,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 297.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

PLAINTIFF'S REPLY ARGUMENT.

If we could agree on the meaning of the words, "injuring," "injury," or, "injurious," and the meaning of the words "maliciously" and "malice," and the meaning of the words "his trade," in this Wisconsin statute, and the meaning of the like words in defendant's brief, much confusion of expression in the brief, if not of thought, would be avoided. *Injury, Rapalje & Lawrence's Law Dictionary. Malice, Ibid. Trade, Ibid.*

The defendant in error argues that the Wisconsin statute is merely declaratory of the common law, and so perhaps it would be if the word, "injuring," contained therein were given its common law meaning; the word, "maliciously," contained therein its common law meaning; and the words, "his trade," contained therein were taken to mean his business reputation or his trade names or trade marks, or something in which he has property. But nothing of this kind was done by the decision of the Court below to which the writ of error runs, and this is, we submit, sufficiently established by the fact that the

plaintiff in error was convicted upon admission of the truth of a plea upon which no lawyer can contend that he could have been convicted at common law.

Chapter 2, page 7, of defendant's brief, contains at once the illustration and proof of this. They argue that, "it was not necessary even at common law to make a combination formed for the purpose of *'injuring'* the business of another illegal that such purpose should be the sole and ultimate object of the combination. It was sufficient if there was a direct or immediate purpose to *'injure'* others, etc." He then cites six cases, all of which go to show that the "injury" mentioned meant not *damnum absque injuria,* but *injuria.*"

The counsel for defendant in error, moreover, do not understand the decision of the Supreme Court of Wisconsin in the same way that Court understands it. For that Court has later and in the case of *Hawarden vs. Youghiogheny & Lehigh Coal Company,* 111 Wis., 549, 550, said:

> "It is undoubtedly true that in the absence of any stat-
> "ute to the contrary, several persons may combine for the
> "purpose of increasing their business and making greater
> "gains by any legitimate means, and if as the incidental re-
> "sult of that combination others are driven out of business,
> "there is no actionable wrong. It is also true that one per-
> "son or a number of persons by agreement may refuse to sell
> "goods to another if the purpose of such refusal be simply
> "to promote his or their own welfare. From these propo-
> "sitions it is argued that no actionable wrong is shown in
> "the present case, that the main purpose of the agreement
> "charged was the lawful purpose to increase their own
> "gains by legitimate means, and hence that the plaintiff is
> "remediless notwithstanding it is also charged that one
> "purpose of the agreement was to drive the plaintiff out of
> "business. It may at once be admitted that this line of
> "reasoning has been adopted by some of the courts which
> "have been called upon to deal with the subject. It has
> "not, however, been adopted by this Court. In fact in a
> "very recent case of *State ex rel. Durner vs. Huegin,* 110
> "Wis., 189, it was in effect repudiated."

Defendant finds (page 6) that Lord Denman's attempted definition, which has been much criticised as being too broad and making it a criminal conspiracy for two persons to agree to walk in a park without leave (*Wright Criminal Conspiracy*, 14, p. 51; 1 *Eddy on Com*b., Sec. 341, et seq.), is all to narrow for them, and illustrate by referring (page 7), to a combination (a) to do an act highly immoral; or (b) against recognized rules of public policy. But (a) does not constitute a criminal conspiracy unless the "highly immoral" act is also unlawful, e. g. a combination to plagiarize is not criminal. While in (b) it is impossible that any act could be "against recognized rules of public policy," and at the same time not be unlawful.

Grouping cognate subjects we must now pass over to the collection of conspiracy statutes found on pages 13 and 14 of defendant's brief, and concerning these we submit each and every one of them is no doubt a valid enactment when so construed as not to deprive any person of liberty or property without due process of law, nor deny to any person equal protection of the laws. In short, as we have said in our original brief, the difficulty is not so much with this Wisconsin statute, although it is an extraordinary statute in the generality of its terms, as it is with the construction given to this statute by the Supreme Court of Wisconsin.

See *Wright on Criminal Conspiracies*, Section 17, "Conclusions," Subdivision 3, entitled, "Agreements for Acts which in the absence of agreements would not be crimes or offenses," also same work, Section 14; also 2 *Eddy on Combinations*, Sections 901, 902, 903, 904, and illustrative statute commented on in Section 905 et seq. It is the decision of the Supreme Court of Wisconsin *to which the writ of error runs* which deprives the plaintiff in error of liberty and property and denies to him the equal protection of the laws. This would be true of the decision if it were based on no statute at all, based on a statute improperly construed, or based on a statute properly construed; the only

difference would be that in the latter case the statute must go down with the reversal of the erroneous decision properly based upon it.

If the concession, "for the purpose of argument," found on page 5 of the brief of counsel for the State, viz: that the state court was wrong in not giving proper effect to the averments of the pleas, is a concession which they ought to make absolutely, or discloses a condition that is apparent to this Court, then the constitutional rights of the plaintiff in error have been as much infringed by such an erroneous decision as if that decision were expressly dictated by statute. Because it is the rule applied by the Court below without regard to the authority, body or Court from which such rule first emanated which is the subject of review in this Court. If the Court below by erroneous construction of the plaintiff's plea punished him for the exercise of a right essential to liberty or the enjoyment of property it thereby laid down an unconstitutional rule. In these sociological-legal questions every erroneous decision in negation of a claim that a person is being deprived of liberty or property without due process of law is necessarily an unconstitutional decision. There is in such instances no middle ground. To be incorrect is to be unconstitutional. And it is perhaps the greatest function of this great Court to pass upon such questions of lasting human and world-wide interest.

MALICE.

The word "maliciously" seems to be used in the brief of counsel for the State at page 5 in the sense of a conscious or intentional violation of the legal rights of another or in the sense of such violation of some rule of public law because he instances as advantageous acts of competition arson and murder. At page 11 he seems to use the word "malicious" in the sense of having personal ill-will or hatred where he says, "The right to earn a living to carry on his business free from malicious interference, free from the unequal power of combinations formed to harass, oppress and destroy is one of the recognized rights, etc." But whatever meaning counsel for the State attaches to this word the meaning given to it by the Supreme Court of Wisconsin is that of personal ill-will or hatred. Because the decision of that Court can only be explained by giving the word "maliciously" the latter meaning or else by considering that the Court ruled that a person has a legal right to retain and hold his trade patronage as against a competitor. Is not this a correct statement of the necessary result of the Wisconsin decisions? *It must establish either one or the other (or both?), of the foregoing propositions, not in words but as a necessary consequence.*

A rule promulgated by a state legislature or Court plainly to the effect that no one should engage in trade competition who at the time felt hatred or ill-will toward his competitor would be subversive of liberty and the rights of property beyond doubt. Now the only alternative is that the rule promulgated by the Supreme Court of Wisconsin is in substance and effect that "maliciously" in this decision has its common law meaning and connotes "a conscious violation of the law to the prejudice of another." But as soon as we give it this meaning we have given the person who has trade patronage a lawful right to re-

tain it as against him who has it not and so brought ourselves within the constitutional interdict against denying persons the equal protection of the laws. This Court has said in *Adler vs. Fenton,* 24 Howard, 407, that an act legal in itself and violating no legal right cannot be made actionable on account of the motive which superinduced it.

Again, in *Connolly vs. Union Sewer Pipe Co.,* 184 U. S., 540, this Court has said, quoting with approval from *Kiff vs. Youmans,* 86 N. Y., 329: "The exercise of the legal right cannot be affected by the motive which controls it."

But without encumbering this brief with numerous citations on this point we desire to refer the Court to the article by L. C. Krauthoff in Volume 21, *Reports of American Bar Association* for 1898, p. 335 to 386, which is a most thorough review of the cases on this subject of malice as an ingredient of a civil cause of action. Illustration: Suppose a state statute made it a misdemeanor to begin suit maliciously on a debt, to maliciously vote against any candidate, to maliciously carry on any lawful trade or profession, to maliciously travel by public conveyance, would such an act be valid? Observe the distinction between the rights of persons requiring affirmative action for their enjoyment, such as the right to vote, the right to engage in trade and competition, the right to travel, etc., and rights of persons not requiring affirmative action in order to enjoy them, as to hold property, to be secure in one's person, etc.

The former rights are effectually denied by a legal rule that the motives governing their exercise can be inquired into in a criminal prosecution. The denial of these rights is a denial of liberty. This brings us to the question suggested in *Rideout vs. Knox,* 2 L. R. A., 81; 148 Mass., 368, where it was said by Holmes, J.:

> "We can concede further that to a large extent the "power to use one's property malevolently in any way "which would be lawful for other ends is an incident of

"property which cannot be taken away even by legislation. "It may be assumed that under our constitution the legis- "lature would not have power to prohibit putting up or "maintaining stores or houses with malicious intent and "thus make a large part of the property of the common- "wealth dependent upon what a jury might find to have "been the past or to be the present motives of the owners."

III.

DENIES THE EQUAL PROTECTION OF THE LAW.

The state law as declared by the Supreme Court of Wisconsin not only makes all competition criminal where the jury may find an improper motive behind it (because all competition is necessarily co-operative and necessarily unkind, and a conspiracy in this sense could be predicated of every imaginable case of competition), but it also denies to persons in that state the equal protection of the laws. Because that law as declared by the Supreme Court of Wisconsin says to A and B who have little trade patronage and associate and agree to acquire more, and to C and D who have no trade patronage and associate and agree to acquire such patronage: "You shall not act together for the purpose of resisting by group or co-operative competition a raise of prices made by E and F who have and are enjoying trade patronage because winning away the customers of E and F is an '*injury*' to E and F." At the same time it says to E and F: "You may combine and act together to keep and hold the trade patronage which you have. Not only this, but you may invoke the criminal laws against A and B or C and D to protect you in your raise of prices and in holding the patronage you have." Consequently the equal protection of the laws is denied. Those who have not trade patronage and would strive for it or those who have little trade patronage and would seek for more cannot combine, associate or concert together to acquire it. While those who are enjoying large or sufficient

trade patronage may combine, associate and concert together to keep it. This is an inadmissible basis of classification. If there were an absolute right of property in trade patronage, or if the business association in the field and enjoying patronage had a different right to it in the law from the newcomer, this classification into those who have and are not within the statute, and those who have not and are within the statute might be valid. But there is no property in the sense of exclusive right in any one to the enjoyment of trade patronage. *Consequently there is no permissible legal basis of classification for the purpose of making guilty those who act together to win away a portion of it and not guilty those who act together to retain it.* Under this rule of law against which we are contending *the same acts which will constitute a criminal offense by the one class who have not patronage will not constitute a criminal offense by the other class who already have trade patronage.* This is no fanciful condition of things, but the direct and immediate result of the Wisconsin decision is to establish this rule. For is not this the real tenor and effect of their decision overruling the plea of the defendant? The right of a person in the law to trade patronage is something like his right to natural gas, subterranean waters, petroleum or animals feræ naturæ, that is, it belongs to him who captures it and only while he holds it. But every other person has the right (doing no trespass) to capture or hold it. A sort of property is acquired *propter imptentiam.* But it lasts only until the animals escape. Suppose two men owned adjoining farms and one tapped a flow of natural gas and was using it and the other thereafter tapped the same reservoir on his farm and began using it. Could the legislature or the courts of a state under this 14th amendment say that the second man should be guilty of a misdemeanor because by the exercise of his legal right to drill a well on his own land he injured the first in the sense of diminishing the quantity or value of the gas which the first had been theretofore

enjoying? Would such an act of the legislature, or such a decision of a court, deny to these two men the equal protection of the laws? If it would in that case, it would as surely do so in the case at bar. A situation somewhat analogous to that in the case at bar on this point developed in the case of *Cote vs. Murphy*, 159 Pa. St., 420; 28 Atl. Rep., 190. There the Court said of the combination:

> "It was not made to lower the price of wages as regu-
> "lated by the supply and demand, but to resist the artificial
> "price made by a combination which by statute was not un-
> "lawful; (2) The methods adopted to further the objects of
> "the combination were not unlawful."

The Court touches upon, but does not directly decide this question. It says:

> "If there be nothing criminal in a combination to artifi-
> "cially raise wages, there can be nothing criminal in an em-
> "ployer's combination to resist the advance or to artificially
> "depress them."

Why not? Manifestly because to make one act criminal and the other innocent would be to deny to the parties the equal protection of the laws. It is not what the courts say argumentatively that constitutes the rule of law established by judicial decision, but what they decide. The decision complained of here lays down the rule that two or more cannot co-operate in competition against another business group to "injure" the latter group by winning away their customers. This establishes that the latter have a legal right to co-operate to retain their patrons or customers because their retention of such customers does not take them away from those who had them not, therefore does not "injure," while the other class, viz: those who have

not trade patronage or customers, will be criminally liable for the same kind of combination and the same acts directed to acquiring new customers.

Respectfully,

W. H. TIMLIN,

Counsel for A. J. Aikens.

ally liable for
lirected to ac-

MLIN,
J. Aikens.

Supreme Court, U. S.
FILED
SEP 20 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1904.

Nos. 3 and 4.

ALBERT HUDSON,
PLAINTIFF IN ERROR,
vs.
THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,
vs.
THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

GEO. D. VAN DYKE,
Counsel for Albert Hudson.
W. H. TIMLIN,
Counsel for Andrew J. Aikens.

TABLE OF CONTENTS.

PAGE.

Statement of Case 2-5
Argument 5-108
Appendix 109-156

INDEX TO APPENDIX.

Statute in question 109
Decision here for review 109
Decision in same case on *habeas corpus* 109-152
Decision in Youghiogheny Coal Co 152-156

INDEX TO ARGUMENT.

CHAPTER 1.

Illustrative instances from adjudged cases and otherwise of acts formerly considered lawful, but made criminal by statute in question as construed 6-23

CHAPTER 2.

Information discussed 23-26

CHAPTER 3.

Advantages resulting to the accused from the agreement or combination in question 26-37

CHAPTER 4.

Of the right to refuse to contract with any person and the question of motive in such refusal as affecting the exercise of that right 37-47

CHAPTER 5.

Boycott and unlawful strike cases distinguished, and the illegal feature of that class of cases pointed out 47-72

CHAPTER 6.

Malice in its legal relation to the exercise of the right to refuse to contract 72-83

CHAPTER 7.

The law of criminal conspiracy in its relation to those constitutional rights of persons which require for their exercise the co-operation of two or more persons 84-90

CHAPTER 8.

Damnum absque injuria necessary to be observed; its disregard puts legal rights on same footing as legal wrongs 90-91

CHAPTER 9.

Of the plea herein, and showing that if malice in fact was the ground of accused's liability the plea could not have been lawfully held insufficient 91-95

CHAPTER 10.

Presents the direct constitutional question whether the courts or legislature of a state may restrain the liberty to contract by punishing the refusal to contract when such refusal is malicious or from malicious motives 95-105

CHAPTER 11.

Of the effect of declaring certain acts legal wrongs on account of their causing loss to third persons, thus establishing a correlative right in such third person and thus in the instant case denying the equal protection of the laws 105-108

TABLE OF CASES.

PAGE.

Adler vs. Fenton, 24 How. 407....19, 77, 90
Ah Jow. In re, 29 Fed. Rep. 181.... 9
Ajello vs. Worsley, 1898, 1 Ch. 274.... 77
Allen vs. Flood, 1898, App. Cas. 1....40, 77
Allgeyer vs. Louisiana, 165 U. S. 578....35, 40, 96
Anderson vs. U. S., 171 U. S. 604, 19 Sup. Ct. Rep. 50....12, 30, 90
Arthur vs. Oaks et al., 11 C. C. A. 209, 63 Fed. Rep. 310....40, 50, 51, 52
Auburn, etc., Co. vs. Douglass, 9 N. Y. 444.... 75
Aurora vs. West, 7 Wall. 93 op.... 6

Baggs Case, 11 Coke 98a.... 22
Baker In re, 29 How. Pr. 485.... 43
Baker vs. Sun Ins. Co., 64 S. W. Rep. (Ky.) 967.... 76
Barr vs. Essex Trades Council et al., 53 N. J. Eq. 101, 30 Atl. Rep. 881.... 63, 64, 65
Beck vs. Ry. Teamsters' Protect. Union, 118 Mich. 497, 77 N. W. Rep. 13.. 68
Block vs. Schwartz, 76 Pac. Rep. 22.... 103
Bohn Mfg. Co. vs. N. W. L. Assn., 54 Minn. 223, 55 N. W. Rep. 1119, 21 L. R. A. 337....21, 53, 63, 90
Booth vs. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425.... 105
Boston Glass Mfg. Co. vs. Binney, 4 Pick. 425.... 45
Boulier vs. MacCauley, 91 Ky. 135, 15 S. W. Rep. 60.... 76
Bowen vs. Matheson, 14 Allen 499....13, 30, 45, 90
Boyer vs. West. Union et al., 124 Fed. Rep. 246.... 90
Boyson vs. Thorn, 98 Cal. 578.... 76
Budd vs. N. Y., 143 U. S. 517, 12 Sup. Ct. Rep. 468.... 17

Carew vs. Rutherford, 106 Mass. 1....40, 44
Chambers vs. Baldwin, 91 Ky. 122....72, 76
Chatfield vs. Wilson, 28 Vt. 49.... 74
Chicago vs. Hurlbert, 68 N. E. Rep. 786.... 43
Chipley vs. Atkinson, 23 Fla. 206.... 74
Coffeyville, etc., vs. Perry, 76 Pac. Rep. 848....38, 95, 102
Com. vs. Hunt, 4 Met. 111....13, 22, 45
Com. vs. Perry, 155 Mass. 117, 14 L. R. A. 325....44, 96, 100
Com. vs. Waterman, 122 Mass. 43.... 87
Connolly vs. Union Sewerpipe Co., 184 U. S. 540....77, 108
Continental Ins. Co. vs. Underwriters, 67 Fed. Rep. 310....77, 79
Cote vs. Murphy, 159 Pa. St. 420, 28 Atl. Rep. 190.... 107
Cox vs. Lee, L. R. 4 Ex. 284.... 70

Delz vs. Winfree, 80 Tex. 400, 16 S. W. Rep. 111, 6 Tex. Civil Ap. 11, 25 S. W. Rep. 50.... 68
Docter et al. vs. Riedel et al., 96 Wis. 158....12, 73, 80
Doremus vs. Hennessey, 176 Ill. 608....40, 67
Dueber Watch Case Co. vs. E. H. Watch & Clock Co, 66 Fed. Rep. 637....17, 31

Eaton vs. Johns, 1 Dowl. N. S. 602.... 70
Erdmann vs. Mitchell et al., 207 Pa. 79, 56 Atl. Rep. 327.... 47

Felton vs. U. S., 96 U. S. 699.... 92
Frazier vs. Brown, 12 Ohio St. 294.... 74
Frisbie vs. U. S., 157 U. S. 160.... 43

Gauvreau vs. Superior, etc., Co., 62 Wis. 403.... 70
Giblan vs. Nat'l, etc., Union, L. R. 2 K. B. Div. (1903) 600.... 94
Gillespie vs. People, 188 Ill. 176, 52 L. R. A. 283.... 103
Glamorgan Coal Co. vs. South Wales, etc., L. R. 2 K. B. Div. (1903) 545.. 94
Glencoe, etc., Co. vs. Hudson, etc., Co., 138 Mo. 439, 40 S. W. Rep. 93...75, 76
Godcharles vs. Wigeman, 113 Pa. St. 431.... 100
Gray vs. Building Trades Council (Minn), 97 N. W. Rep. 663.... 48
Greenwich, etc., Co. vs. Carroll, 125 Fed. R. 121.... 104
Grice In re, 79 Fed. Rep. 627, 169 U. S. 234, 18 Sup. Ct. Rep. 328....18, 90

PAGE.

Hake vs. Brames, 95 Ind. 161 70
Harwood vs. Benton, 32 Vt. 724 74
Hawarden vs. Coal Co., 111 Wis. 549 ..... 2, 93, 152
Heywood vs. Fillson, 75 Me. 225 ..... 22, 62
Hoare vs. Silverlock, 12 Q. B. 624 70
Hopkins vs. Oxley Stave Co., 83 Fed. Rep. 912 62
Hunt vs. Simonds, 19 Mo. 583 ..... 11, 90
Huttley vs. Simmons, 1898 1 Q. B. 181 77

Iron Co. vs. Uhler, 75 Pa. 467 14

Jacobs In re, 98 N. Y. 98, 50 Am. Rep. 636 100

Kearney vs. Lloyd, 26 L. R. (Irish) 268 90
Kelly vs. Ry. Co., 93 Ia. 436, 61 N. W. Rep. 957 77
Kiff vs. Youmans, 86 N. Y. 324 77
Knudsen vs. Benn, 123 Fed. Rep. 636 63

Lawton vs. Steele, 152 U. S., 133, 18 Sup. Ct. Rep., 499 101
Louisville vs. Louisville, 14 L. R. A., 579 108
Lumley vs. Gye, 2 El. & Bl., 216 76

MacCauley vs. Tierney, 37 L. R. A., 455 20
Machine Co. vs. Gage, 100 U. S., 676 8
Mahan vs. Brown, 13 Wend., 261 74
Martell vs. White et al., 69 N. E. Rep., 1085 ..... 53, 94
Mathews vs. Illinois, 202 Ill., 389 108
Millett vs. People, 117 Ill., 294 100
Montana Co. vs. St. Louis Co., 152 U. S., 170 ..... op. 9
Mugler vs. Kansas, 123 U. S., 623; 8 Sup. Ct. Rep., 273 101
Munn vs. Illinois, 94 U. S., 113 17

National P. Assn. vs. Cummings, 170 N. Y., 315; 58 L. R. A., 135 69
Niagara F. Ins. Co. vs. Cornell, 110 Fed. Rep., 816 ..... 9, 95, 104

O'Callaghan vs. Cronan, 121 Mass., 114 77
Orr vs. Ins. Co. et al., 12 La. Ann., 255 ..... 11, 90

Park & Sons Co. vs. Nat'l Drug Assn., 175 N. Y., 1; 67 N. E. Rep., 136; 62 L. R. A., 632 67
Passaic Print Works vs. Ely, Etc. Co., 44 C. C. A., 426; 62 L. R. A., 673 .. 78, 80
People vs. Gillson, 109 N. Y., 389 ..... 10, 29, 95, 100, 103
People vs. Warren, 34 N. Y. Supp., 942 ..... 43, 96
Penn. R. R. Co. vs. Marchant, 119 Pa. St., 541 7
Perkins vs. Pendleton, 90 Me., 166 62
Phelps vs. Nowlen, 72 N. Y., 39 ..... 12, 22, 74
Plant vs. Woods, 176 Mass., 492; 51 L. R. A., 339 ..... 56, 61
Potter vs. U. S., 155 U. S., 438 92

Quin vs. Leathem, 1901 App. Cas., 495 80

Raycroft vs. Tayntor, 68 Vt., 219 ..... 12, 14, 73
Rex vs. Kilderby, 1 Saunders, 308 3
Rice vs. Albee, 164 Mass., 88 56
Rideout vs. Knox, 148 Mass., 368 45
Ritchie vs. People, 155 Ill., 98; 29 L. R. A., 79 100
Robinson vs. Texas Pine Land Assn., 40 S. W. Rep., 843 80

Scottish Etc. vs. Glasgow Etc., 35 Scot. L. R., 645 30
Solverson vs. Peterson, 64 Wis., 198 70
Sherburne vs. Rodman, 51 Wis., 474 92
South Royalton Bank vs. Suffolk Bank, 27 Vt., 505 ..... 74, 90
Spalding vs. Vilas, 161 U. S., 483; 6 Sup. Ct. Rep., 631 78
St. Joseph vs. Levin, 31 S. W. Rep., 101 43

PAGE

State vs. Buchanan, 5 Harr. & J., 317 86
State vs. Burnham, 15 N. H., 396 87
State vs. Dalton, 22 R. I., 77; 46 Atl. Rep., 234; 48 L. R. A., 775 104
State vs. Dodge, 56 Atl. Rep., 983 104
State ex rel. Durner vs. Huegin, 110 Wis., 249 104
State vs. Glidden, 55 Conn., 46; 8 Atl. Rep., 90 73
State vs. Goodwill, 33 W. Va., 176; 6 L. R. A., 621 85
State vs. Julow, 129 Mo., 163; 29 L. R. A., 257 100
State vs. Loomis, 115 Mo., 307; 21 L. R. A., 789 ..... 10, 42, 95
State vs. Santee, 53 L. R. A., 763 100
State ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530 105
Steamship Co. vs. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 599; 1892 App. Cas., 25 ..... 28, 29, 39, 95, 101
Street vs. Varney Etc. Co., 160 Ind., 338; 66 N. E. Rep., 895 ..... 11, 22, 25, 30, 65, 66, 77
Stuart vs. Palmer, 74 N. Y., 183 104
 9

Temperton vs. Russel, 1 Q. B., 715 65
Thorley vs. Lord Kerry, 4 Taunt., 355 70
Toledo Etc. Ry. Co. vs. Penn. Ry. Co., 54 Fed. Rep., 730 65
Trade Mark Cases, 100 U. S., 82 9

Underhill vs. Murphy (Ky.), 78 S. W. Rep., 482 63

Van Horn vs. Van Horn, 52 N. J. L., 284 55
Van Horn vs. Van Horn, 56 N. J. L., 318 65
Vegelahn vs. Guntner, 167 Mass., 92; 35 L. R. A., 722 55
Villers vs. Monsley, 2 Wils., 403 70

Walker vs. Cronin, 107 Mass., 555 ..... 16, 68, 74, 80
Wallace vs. Ga. Etc. Rd. Co., 94 Ga., 732 ..... 41, 96
West Va. Tr. Co. vs. Standard Oil Co., 50 W. Va., 611 ..... 14, 90

TEXT BOOKS.

American Bar Assn. Rep., Vol. 21 (1898), 335-390 ..... 72, 74
Bishop Statutory Crimes, 2d Ed., Sec. 447 24
18 Central Law Journal, 424 77
Cooley, Torts 668, 830, 278 ..... 14, 41, 97
1 Eddy Trade Comb., Sec. 480 16
Greenhood Public Policy, Rule 303 43
8 Harvard Law Review, 511 75
1 Jag., Torts 87 14
Pollock, Torts, Webb's Ed., 331—335 79
Proceedings Amer. Economic Assn., 1899, 78-173 ..... 87, 88
R. S. Wis., 1898, Sec. 4466a 109
1 Whart. Crim. Law, 10th Ed., Ch. 2 85
2 Whart. Crim. Law, 10th Ed., Ch. 21, Sec. 1338 87
Wright Crim. Conspiracy, Sec. 14 86

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1904.

Nos. 3 and 4.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

A writ of error was sued out of this Court by each of the plaintiffs in error above named, directed to the Supreme Court of the State of Wisconsin, to review the final judgment of that Court affirming the judgment of the Municipal Court of Milwaukee County, Wisconsin, which adjudged the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt guilty of having committed a misdemeanor, as charged in the information, to-wit: conspiracy to injure another in his trade or business under Section 4466a of the Statutes of Wisconsin of 1898, and sentenced each of them to

pay a fine with costs, and in default of payment to be committed to the House of Correction of Milwaukee County at hard labor until such fine and costs were paid, not, however, to exceed thirty days.

STATEMENT.

I. (In the appendix to this brief (see index) there will be found the statute of the State of Wisconsin under which the prosecution was brought, the opinion of the Supreme Court of Wisconsin upon the decisions brought up by this writ of error, the prior opinion of the Supreme Court of Wisconsin in this same case on habeas corpus, and the opinion of the Supreme Court of Wisconsin in the case of *Hawarden vs. Coal Co.*, 111 Wis., 549, construing and explaining its decisions in this case to apply to cases of trade competition.)

II. October 1st, 1901, an information (printed record, p. 16) was filed in the Municipal Court of Milwaukee County, Wisconsin, which attempted to set up an offense under the above statute. Reduced to its simplest form, the information, in substance, charged that the accused, viz: the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt, each of whom was the business manager of a daily newspaper published in the City of Milwaukee, in said county, respectively named the Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, for the purpose and with the intent of wilfully, maliciously and *unlawfully* injuring the Journal Company (which was a corporation engaged in publishing another daily newspaper in said city, viz.: The Milwaukee Journal) *in its trade and business*, and also Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum (who were stockholders and officers of The Journal Company), and each of them, in their trade and business; had combined together and *agreed that if any person advertising or proposing to advertise* in The Milwaukee Journal *should pay* The Journal Company

an increased rate then recently established or fixed by it, then and in that case any SUCH PERSON *should not be permitted to advertise in any of the other three newspapers,* to-wit: The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, *unless* SUCH PERSON *should advertise in each of said three papers and should pay to each of them an increase equal to the said recent increase of the Journal's rates over the rates theretofore charged by said three papers respectively; but that in case any person should refuse to pay to The Journal Company its increased rate, then such person should be at liberty to advertise in either or all of the other three papers at the rates which had theretofore been charged by them respectively;* and further charged, in substance, that in pursuance of said agreement advertisers had been notified of said agreement and had been induced to withdraw their advertisements from The Milwaukee Journal, and other advertisers had been prevented from advertising therein, all to the injury of The Journal Company.

III. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, each interposed a separate special plea in bar (printed record, p. 19.) These pleas are exactly alike and are in the nature of pleas in confession and avoidance, a precedent for which is found in *Rex vs. Kilderby,* 1 Saunders, 308, cited 1 Chitty Crim. Law, 472.

They admit the agreement and acts in pursuance thereof, as alleged in the information, and while they assert that the intent was to injure The Journal Company, they do not admit that their acts were either malicious or unlawful, but on the contrary they allege "that those acts, intentions, agreements and combinations were done, harbored, made and entered into in *trade competition,* and that such acts, intentions, agreements and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," and as free men and citizens of the United States and of the State of Wisconsin and as competitors in business with The Journal Com-

pany they claimed immunity therefor under Article XIV of the Constitution of the United States, notwithstanding any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary.

IV. The prosecution moved to strike out the special pleas above mentioned, which motions were denied, and thereupon asked that said motions might stand and be considered as demurrers to such special pleas, and the accused consenting thereto it was so ordered. After a hearing the demurrers to said special pleas were sustained, and the accused having elected to stand on their said pleas, were found guilty thereon, as charged in the information, and sentenced as above mentioned.

V. Upon writ of error the Supreme Court of the State of Wisconsin affirmed this judgment (printed record, p. 52), and to review the latter judgment this writ of error was sued out.

VI. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, have each filed assignments of error upon which they rely to reverse said judgment. They are alike, and in substance are as follows (printed record, p. 9):

(1) The Court erred in sustaining the demurrers interposed by the State of Wisconsin to the pleas filed by the accused, and by holding and deciding that the facts stated in said pleas were not sufficient to constitute a defense to the matters and things charged in the information.

(2) The Court erred in determining that the pleas filed by the accused were not a sufficient justification and defense under the XIVth amendment of the Constitution of the United States.

(3) The Court erred in sustaining the demurrers of the State of Wisconsin to the pleas of the accused *and in not deter-*

mining upon said pleas that the information was insufficient in law.

(4) The Court erred in adjudging the accused guilty on the record before it, viz: said information and pleas, and sentencing them to fine and imprisonment and affirming the judgment of the trial court in that regard, for the reason that said record shows that said sentence and conviction were in violation of the rights of said accused under the XIVth amendment of the Constitution of the United States, in that it deprived them of the use of their property without due process of law, and in that it deprived them of the liberty guaranteed them by said XIVth amendment to make contracts not inimical to public health, welfare or morals, and in that it deprived the said accused of their liberty and abridged the privileges and immunities of said accused as citizens of the United States, and denied to them the equal protection of the law.

VII. Melvin A. Hoyt, above mentioned, demurred to the information; his demurrer was overruled, and standing on his demurrer he was found guilty, as charged in the information, and he was sentenced in the same manner. Upon writ of error the Supreme Court of Wisconsin affirmed this judgment, and to review this latter judgment he has sued out his writ of error.

ARGUMENT.

I.

The precise question presented is this: does Section 4466a, Wisconsin Statutes of 1898 as interpreted and applied by the Wisconsin Supreme Court, deprive the accused of their liberty or property or deny to them the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In this brief we assume that it is settled law that there is in this section of the Constitution an *express restriction* against the state, through any of its governmental agencies, executive, legislative or judicial, depriving any person of liberty or property without due process of law and that the words "liberty or property" not being defined in the Constitution it is for the Court to determine their scope and meaning according to the usual rules of construction, including of course the meaning which has been given to these words or either of them in judicial decisions, or juristic writings.

In the former brief and argument in this cause in this Court the said Wisconsin statute construed as it is by the decisions of the Supreme Court of that state hereinbefore mentioned, was challenged upon like grounds and the distinction following referred to without making, however, separate chapters of the different points of attack thereon. It may be more orderly to separate the argument as follows, viz.:

1.

It is elementary and logical that a demurrer to any subsequent pleading is carried back to the first defective pleading in the cause (*Aurora vs. West*, 7 Wall., 93 op.) consequently the demurrer of the state to the plea in bar of the accused in the Court below first tests the sufficiency of the information as effectively as a demurrer to that information would do. We will therefore first present the argument from the standpoint of a demurrer to the information, and in a separate chapter discuss the sufficiency of the plea of the accused. The first thing that strikes us is the extraordinary generality of the statute in question. It prohibits two or more persons from associating or concerting together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession *by any means whatever*. "By any means whatever," of course includes lawful means, that is to say includes the exercise of means authorized or justified by some rule of law. The statute, therefore, expressly covers the case of one person being injured in his reputation, trade, busi-

ness or profession by the exercise on the part of two or more other persons of some otherwise unquestioned legal right which such two or more other persons might possess, or by the doing of any otherwise innocent or harmless act on the part of such two or more other persons. Provided, of course, such legal right were exercised wilfully or maliciously. But of these words hereafter. The statute further punishes any person maliciously compelling another to do or perform any act against his will without regard to the legal quality of the act compelled, or the status or relations of the parties; and also punishes those who associate or concert together for the purpose of preventing or hindering any other from doing or performing any lawful act. What acts are lawful must be determined not from this statute but from the great body of laws written and unwritten. It is lawful to compel another to do or perform many acts against his will, such as to compel him to pay a debt. So it must be criminal under this act to compel another to perform an act against his will and it also must be criminal to hinder the first from compelling the other to do the act against his will. So with the association or concert for the purpose of injuring another in his reputation, trade, business or profession. To punish one man for causing loss to another in his reputation, trade, business or profession by lawful means, viz. by the exercise of some legal right possessed by the first, is to deny totally the doctrine of *damnum absque injuria* without which doctrine no system of law would be consistent with due regard for the liberty of the citizen. But this statute forbids this injury, " by any means whatever."

If the Supreme Court of Wisconsin had limited the word "injury" in this penal statute to mean, "an infraction of some legal right" (*Penn. R. R. Co. vs. Marchant*, 119 Pa. St., 541; same case 13 Atl. Rep., 690) or had excepted the acts of co-operation in trade competition, from the purview of the statute in the decision now before this Court on writ of error, different questions might arise. But that Court did not do so. It treated loss of customers as an "injury." Because this is the only injury claimed.

By reason of the generality of the words, "by any means whatever," just as soon as we depart from the legal or technical meaning of the word, "injuring," in the construction of this statute and give that word the meaning of "causing loss or damage," we have an unconstitutional statute because then the statute is made to read as follows:

"If two or more persons wilfully or maliciously combine to "cause loss to another *by any means whatever*, they shall be "punished,"

that is to say, if loss result to one from the wilful or malicious exercise of a legal right by others the latter shall be punished. This would make persons hold every legal right, including the right to contract, the right to hold property, the right to sue, the right to marry, the right to vote, the right to travel and generally every right, subject to arrest and inquiry as to the motives with which he exercised that legal right.

The question of the constitutionality of Section 4466a hereinbefore referred to must be determined in this Court upon the construction given to that statute by the Supreme Court of Wisconsin (*Machine Co. vs. Gage*, 100 U. S., 676) namely: that the statute is meant to prohibit intentional joint action of any kind, which joint action is intended to cause a loss of trade to another. This includes within the purview of the statute co-operation in trade competition. Thus construed we submit the statute is unconstitutional and in conflict with the Fourteenth Amendment to the Constitution of the United States. It is not difficult to instance cases of purely innocent acts which under this statute as interpreted and applied by the Supreme Court of Wisconsin, would be deemed criminal. A partnership agreement for the purpose of engaging in trade which would invade the business field of another and injure him in his business by reducing the number of his customers, would be an instance. If this statute so construed covers the case of a partnership, as we think it unquestionably does, then the statute must fall as unconstitutional because its constitutionality is to be tested not only by what has been declared criminal under it but by what may be so declared, for a criminal statute can-

not be used as a drag net to ensnare the guilty and the innocent, leaving the latter to extricate themselves as they can.

Trade Mark Cases, 100 U. S., 82.

Montana Co. vs. St. Louis Co., 152 U. S., 170 op., citing *Stuart vs. Palmer*, 74 N. Y., 183.

In re Ah Jow, 29 Fed. Rep., 181.

Not only does the Wisconsin statute as construed, subject to criminal prosecution those who enter into an ordinary partnership to compete in trade and win away customers from another, at least provided a jury finds their intentions in doing so to be malicious, but it makes criminal many agreements in trade competition approved and found to be a lawful exercise of the right of liberty of contract by many other eminent courts. For example: several insurance companies concerting or agreeing together to fix rates on different property.

Niagara Fire Ins. Co. vs. Cornell, 110 Fed. Rep., 816, from which we quote (p. 824):

"If we cannot acquire property, then we have a government "of socialism. And how can we acquire property, or enjoy the "property we do have without the right of contract? If this "law is valid two or more farmers cannot agree that they will "not sell their wheat to a neighboring mill for less than so much "per bushel. Two or more farmers cannot agree that the live-"stock feeder shall not have their corn, only at a certain price. "Blacksmiths cannot agree that they will charge so much for "shoeing horses. Nothing can be agreed to by the manufac-"turer, the farmer, gardener, the contractor, consumer or lab-"orer, to prevent the reduction of price. Can it be possible that "such legislation is valid? If it is valid, then what becomes of "the provision, 'no man shall be deprived of equal protection "'of the law,' or of that other provision, 'that no man shall be "'deprived of life, liberty or property without due process of "'law'? Justice Field once said: 'The right to pursue them "'without let or hindrance is a distinguishing privilege of the "'citizens of the United States and an essential element of that "'freedom which is their birthright.' Another justice of the "United States Supreme Court said: 'Yet the power does not "'and cannot extend to prohibiting a citizen from making con-"'tracts and this is institutional law in England as well as "'America.' Another great judge has said: 'Liberty includes

"'the right to acquire property and that means and includes "'the right to make and enforce contracts'."

Again, for example: If two or more employers agree together to employ only those persons who did not belong to labor unions as one employer did in *State vs. Julow*, 29 L. R. A., 257 (Mo.), from which we quote:

"Nor can the statute escape censure by assuming the label "of a 'police regulation.' It has none of the elements or attri- "butes which pertain to such regulation, for it does not in terms "or by implication promote or tend to promote the public "health, welfare, comfort or safety; and if it did, the state "would not be allowed under the guise and pretense of a police "regulation, to encroach or trample upon any of the just rights "of the citizen which the constitution intended to secure against "diminution or abridgement."

Again for example: This construction of the statute would make criminal the agreement of two or more persons to sell, exchange or dispose of any article of food upon any representation that a gift, prize or premium will be given therewith to the purchaser, as was done by one person in *People vs. Gillson*, 109 N. Y., 389; 17 N. E. Rep., 343, where the Court said:

"This statute, if valid, steps in to prevent his adopting such "a course to procure trade and from it to secure an income "and livelihood for himself and family. He is thus restrained "in the free enjoyment of his faculties which he ought to have "the right and liberty to use in the way of creating or adopting "plans for the increase and growth of his trade, business or oc- "cupation unless such restraint is necessary for the common "welfare. * * * That a man engaged in trade will not for "any length of time continue to sell an article below what it "costs him to procure it, is a safe assumption, while it is "equally safe to say that he may do so for a time—long enough "to enable him to introduce his article to the notice of the "public and to create a demand for it which he will make a "profit by supplying. Or he may make a profit by supplying "one article which will amount to enough to enable him to give "away some other article with it and permit him to receive the "average rate of profit in the business which he is engaged in."

Again for example: This construction would make criminal and unlawful a concert or agreement to give an advantage

either by way of rebate or bonus to those persons who would take away all patronage from the competitor, and give the parties making such offer their whole trade, as was declared lawful in *Steamship Co. vs. McGregor*, 21 Q. B. D., 544; 23 Q. B. D., 598, 1892, App. Cas., 25.

Also for example: Where two or more persons agreed not to write insurance on any boat upon which the plaintiff was employed as in *Orr vs. Ins. Co. et al.*, 12 La. Ann., 255; 68 Am. Dec., 770, the Court said:

"Undoubtedly either of the defendants had the right separ-
"ately to decline taking any risk on any boat on which the
"plaintiff should be employed as master. Nor could the mo-
"tives of the company be questioned; whether they were ma-
"licious and with the sole design of injuring the plaintiff or
"not, would be entirely immaterial in a legal point of view so
"long as there was no contract on their part and no legal obli-
"gation to insure such boat. Courts can enforce only legal ob-
"ligations and redress injuries to *legal* rights." * * * The
"inconvenience which the plaintiff has suffered is but a *damnum*
"absque injuria."

This case is sometimes erroneously cited to sustain the broad proposition that whatever one may lawfully do alone two or more acting together may lawfully do, but this is erroneous, an unwarranted deduction of a general rule from a single instance and we make no such contention.

Also for example: Where several persons agreed that neither of them would insure a particular item of property owned by the plaintiff as in *Hunt vs. Simonds*, 19 Mo., 583, where the Court said (p. 591):

"He (plaintiff) had no right in law to demand insurance
"upon his boat from one or all of the defendants, nor that they
"should insure cargo upon his boat, and consequently their re-
"fusal to insure from any motive however improper could give
"him no right to sue them."

Also for example: Where several persons engaged in the business of buying cattle as yard traders associate and agree that they will not transact business with others in the same business who are not members of defendant's association but who may become such members by complying with the condi-

tions of membership as in *Anderson vs. United States*, 171 U. S., 604; 19 Sup. Ct. Rep., 50. The Court said:

"In the view we take of this case we are not called upon to "decide whether the defendants are or are not engaged in inter- "state commerce. * * * From very early times it has been "the custom for men engaged in the occupation of buying and "selling articles of a similar nature at any particular place to "associate themselves together. * * * The design of the "defendants evidently is to bring all the yard traders into the "association as members so that they may become subject to its "jurisdiction and be compelled by its rules and regulations to "transact business in the honest and straightforward manner "provided for by them * * * and if for the purpose of "compelling this membership the association refuse business "relations with those commission merchants who insist upon "buying from or selling to yard traders who are not members "of the association, we see nothing that can be said to affect the "trade or commerce in question other than in the most round- "about and indirect manner."

In the case at bar did not the plaintiff in error alone, or with those associated, have the right to refuse their advertising columns absolutely to all who did not give him or them sole patronage? This includes the right to refuse to receive advertising from anyone who patronized the competitor, the Journal. But here they did not go so far but only refused, except on condition, not all the Journal's patrons, but only some of them.

Also for example: Where two persons, one of them a bank, conspired together for the purpose of destroying plaintiff's credit and business and without any demand or notice to plaintiff caused a judgment to be entered on *cognovit* against the plaintiff and immediately issued execution and (the sheriff) forcibly broke into plaintiff's store and levied on his property, as in *Docter et al. vs. Riedel et al.*, 96 Wis., 158, where the Court said:

"By this instrument the plaintiffs authorized its holder to "enter judgment and issue execution, and this is all that has "been done. The defendants seem to have acted strictly within "their right. The general rule is that where one exercises a "legal right his undisclosed motives are immaterial. *Phelps vs. "Nowlen*, 72 N. Y., 39; *Raycroft vs. Tayntor*, 68 Vt., 219; 33 "L. R. A., 225. We see no reason why the rule should not

"apply here. The defendants having collected their debt in a "way which they were authorized to use, *we cannot punish "them for their secret motives.*"

Again for example: Where one sustained a loss of custom or patronage by reason of an association or organization or combination of two or more who refused to furnish or ship sailors to him and took their sailors out of ships because his men were in the same ship, as in *Bowen vs. Matheson*, 14 Allen, 499, where the Court said:

"We can see nothing criminal in any of these stipulations; "See *Commonwealth vs. Hunt*, 4 Met., 111; and nothing illegal. "If their effect is to destroy the business of shipping masters "who are not members of the association, it is such a result as "in the competition of business often follows from a course of "proceeding that the law permits. New inventions and new "methods of transacting business often destroy the business of "those who adhere to old methods. Sometimes associations "break down the business of individuals and sometimes an indi- "vidual is able to destroy the business of associated men. It "would be nothing novel if the plaintiff, in the exercise of his "ingenuity, should in his turn adopt some improvement that "shall compel the defendants to dissolve their connection. As "the declaration sets forth no illegal acts on the part of the "defendants the demurrer must be sustained."

Applying this in the case at bar the decision below would make criminal all new devices and new methods which would cause loss to an established business in the exercise of trade competition.

Again for example: Where two corporations engage in competition with a third corporation, "maliciously and wick- edly contriving and intending to injure the plaintiff and ruin its business," did confederate and conspire together and with another to prevent all persons producing, refining, selling or transporting oil, from executing any lawful trade in connection therewith, with such competitor, and purchased the land on which the plaintiff had its pipe lines and from which it trans- ported oil for compensation, obtained a controlling interest in the corporation which furnished the plaintiff oil for transpor- tation and induced the construction of a rival pipe line com- pany to transport said oil, as alleged in the declaration and ad-

mitted by demurrer in *West Virginia Transportation Co. vs. Standard Oil Company,* 50 W. Va., 611; 40 S. E. Rep., 591, it was ruled that there was no right of action in the plaintiff. The Court said among other things:

"The mere fact that a complainant may have suffered dam-"age of the kind which the law recognizes is not enough. There "must also be a violation of a duty recognized by law. In the "language of the civil law mere *damnum* is not enough; there "must also be *injuria;* that is, '*ex damno absque injuria non* " '*oritur actio.*' I Jag. Torts, 87. We must nicely distinguish " between *damnum* and *injuria.* We commonly use the words " 'injury' and 'damage' indiscriminately, but in the rule above, "these Latin words are distinct. 'Damnum' means only harm, "hurt, loss, damage; while 'injuria' comes from 'in,' against, and " 'jus,' right, and means something done against the right of "the party producing damage and has no reference to the fact "or amount of damage. Unless a right is violated, though there "be damage, it is *damnum absque injuria.* Such is the case un-"der the first count of the declaration. The plaintiff had a "perfect right to operate its business. So had the defendants "the right to operate theirs. They both had right to compete "for business. There is no right better established under the "law of business than the right of trade competition."

Again: "An act which does not amount to a legal injury "cannot be actionable because done with a bad intent. Any "transaction which would be lawful and proper if the parties "were friends, cannot be made the foundation of an action "merely because they happen to be enemies. So long as a man "keeps himself within the law by doing no act which violates it, "we must leave his motives to Him who searches the heart. To "state the point in a few words, whatever one has a right to do "another cannot have a right to complain of. *Cooley Torts,* "688, 830. 'If one be moved by malice to the exercise of a legal " 'right, no action arises.' *Raycroft vs. Taynton,* 68 Vt., 219; "35 Atl. Rep., 53; 33 L. R. A., 225; 54 Am. State Report, 882. " 'A lawful act is not actionable though it proceed from mali-"cious motives.' *Iron Co. vs. Uhler,* 75 Pa., 467."

The Court further said:

"The gravest item under this head is the charge that the "Standard Company required oil producers (without specify-"fying any but the West Virginia Oil Company), as a condition "precedent to purchasing their oil, to ship through said pipe "line and required those producers in the land of the West

"Virginia Oil Company to do so as a condition precedent to "holding their leases, notwithstanding that the more usual "and satisfactory route of transport was the pipe line "of the plaintiff; and that later the defendants, through "the Eureka Pipe Line Company, to further accomplish their "purpose of ruining the plaintiff, built a branch pipe line "through territory which had for years patronized the plaint-"iff's line, in order to prevent and forestall the plaintiff from "transacting, acquiring or maintaining any business and from "extending its line to any other territory, and that the defend-"ants and confederates by their monopoly and control over the "oil business, refused to ship, or permit others to ship oils or "buy oils shipped through the plaintiff's line, and being the only "refiners of oil at Parkersburg and elsewhere, refused to buy "oil shipped through the pipe line of the plaintiff. At first "blush this conduct might appear wrong; but a second thought "again presents the question whether the defendants in this "did anything unlawful. The defendant companies were all in "common interest. *Could they not unite to further their in-"terests?* Could not the Standard Oil Company buy from "whom it chose? And within the pale of this right could it "not impose such conditions as it chose? Cannot the village "merchant say to the farmer, 'I will not buy your eggs unless "'you buy my calico?' Can not the big mill owner refuse to "buy wheat from those who do not ship it over a railroad or "steamboat line owned by him? Can not the mill owner refuse "to lease his farm to those who do not sell products to his mill? "He may be exacting and oppressive but can other mill owners "sue him for this? Is this right not a part and parcel of his "business right? It is the right even when there is no common "ownership as there is in this case of one man to buy of whom "he chooses and he can impose arbitrary, hard conditions if the "other party chooses to accede to them. *So it is the clear right "of the other party to sell to whom he chooses*, and he having "this right, how does the other party do a wrong in purchasing "from him? The right of the one carries with it the right of "the other. * * * Counsel for plaintiff put emphasis on "the charge of conspiracy and malice, but there can be no con-"spiracy to do a legitimate act—an act which the law allows— "nor malice therein. To give action there must not only be "conspiracy, but conspiracy to do a wrongful act. If the act "is lawful no matter how many unite to do it."

Observe in this case that the acts were lawful and the combination or association for that purpose was lawful. The defendants had the legal right to do the acts complained of and

had in addition the legal right to concert togther for that purpose. In the same case there was, however, another charge in the first count of the declaration to the effect that the defendants wickedly and maliciously, to injure the plaintiff, represented to the customers of the plaintiff that the plaintiff's pipe lines and appliances were unsafe and dangerous for the transportation or storage of petroleum. This was held to save the first count of the declaration. In the same case and in the second count of the declaration it was charged that the defendants conspired to destroy the plant and business of the plaintiff and did by threats and unfair means oblige persons owning and producing oil who had formerly been the customers of the plaintiff to ship their oil by other means of transportation than those of the plaintiff. This count omitted to state that the defendants were also engaged in the business of buying and transporting oil as competitors. The Court says:

"While the first count does, the second count does not, state "that the defendants were engaged in the business of buying "refining and transporting oil as competitors with the plaintiff "*and thus present a justification for their action*, but simply "charges that they interfered unlawfully and maliciously with "the plaintiff's business with malign purpose to destroy it "This, I think, is a legal cause of action. * * * Every "one has a right to enjoy the fruits of his own enterprise, in "dustry, skill and credit. He has no right to be protected "against skill and competition, but he has a right to be free "from malicious and wanton interference, disturbance and an "noyance. If disturbance and annoyance come as a result o "competition or the execution of like rights by others, it is *dam "num absque injuria* unless some superior right by contract o "otherwise is interfered with, but if it comes from the mer "wanton or malicious acts of others without the justification o "competition or the service of any interest or lawful purpose "then it stands on a different footing and the wrong is actio "able. *Walker vs. Cronin*, 107 Mass., 555; *1 Eddy Trade Comb* "Sec. 480."

Again for example: The case at bar shows that those wh gave the associated defendants their whole patronage, namely those who do not patronize their competitor, the Journal, o tain better rates and better terms, as in the reported case

Dueber Watch Case Co. vs. E. H. Watch & Clock Co., decided by the Circuit Court of Appeals of the second circuit on March 5th, 1895, and reported in 66 Fed. Rep., 637, where the defendants were alleged to have committed unlawful acts and entered into unlawful combination to refuse to sell their goods to persons who bought or dealt in plaintiff's goods to the injury of the plaintiff's trade, etc. The Court said:

"An individual manufacturer or trader may surely buy "from or sell to whom he pleases, and may equally refuse to buy "from or to sell to anyone with whom he thinks it will promote "his business interests to refuse to trade. That is entirely a "matter of his private concern with which governmental pater- "nalism has not as yet sought to interfere except when the prop- "erty he owns is 'devoted to a use in which the public has an in- "terest'; and such public interest in the use has as yet been "found to exist only in staple commodities of prime necessity. "*Munn vs. Illinois*, 94 U. S., 113; *Budd vs. N. Y.*, 143 U. S., 517; "12 Sup. Ct. Rep., 468. It is a business device probably as old "as business itself to seek to increase the number of one's cus- "tomers and the extent of their purchases by treating more fav- "orably those who become exclusive customers. Certainly there "is nothing unlawful or unfair in the statement to the trade by "the maker of any kind of merchandise, 'My goods are for sale "only to those who will buy from me exclusively, not to oth- "ers.' And the case is in no way different if a half a dozen "individuals combine into a partnership or an hundred individ- "uals combine into a corporation and adopt the same method to "enlarge their business. If this be so—and no authority to "which we are referred holds to the contrary—it is difficult to "see in what respect it is unlawful for a score of different manu- "facturers to enter into a like arrangement to push the sales of "their own goods or to secure some business benefit to them- "selves by increasing the number of their exclusive customers "when there is nothing to show that the parties so combining "constitute substantially all or even a majority of the manufac- "turers of such goods even in the half dozen states where their "factories are located and when the field for manufacture is "open to all. It is not an unlawful business enterprise for sell- "ers to seek to secure the entire trade of individual buyers and "an agreement between sellers who wish to confine their deal- "ings to such buyers only, not to sell to others, is not an unfair "or unreasonable measure of protection for such trade."

Apply this to the charge that all advertisers who pay the Journal its increased rates will only be permitted to advertise in the other three newspapers on condition that they advertise in all three of the others and pay like increased rates.

Again for example: On an indictment against several charging that they "did unlawfully agree, combine, conspire, confederate and engage in a conspiracy against trade, creating a trust by the combination of their capital, skill and acts," as in the case of *In re Grice*, 79 Fed. Rep., 627, the Court said: (p. 643.)

"The right to combine to form partnerships and joint stock "associations, the right to agree as to prices and productions; "the right to fix prices, to raise and lower them as business men "may require—is not oppressive to the public nor unjust to "the individual nor contrary to public policy. It is an essential "right as part of the liberty of the citizen of which no legisla- "ture can deprive him. If an ordinary business partnership is "rendered criminal by the act no further argument is neces- "sary."

The decision in this case was reversed in 169 U. S., 284; 18 Sup. Ct. Rep., 323, but not on any ground affecting the correctness of the proposition above quoted.

We also stand upon this proposition and maintain that it cannot be gainsaid, that an ordinary business partnership is rendered criminal by the Wisconsin Act of Section 4466a as interpreted by the Supreme Court of Wisconsin. It is true that if malice is a question of fact in the construction of this statute, a question which we will come to hereafter, the jury may find that a partnership was not formed maliciously and the partners may luckily be acquitted, but this cannot save the statute because as we have said before, no man should be said to hold these rights essential to liberty at the whim of any tribunal authorized to inquire into the intention with which he exercised them. Quoting further from the opinion: (p. 643.)

"That it is so most clearly appears from the concluding por- "tion of Section 1 by which two or more persons are forbidden "to unite any interest that they may have in connection with "the sale or transportation of any article or commodity that is

"price might in any manner be affected. Two village grocers "doing business at a loss to both could not form a partnership "in order to save both from bankruptcy. Neither could they "form a partnership in order that they might lessen their ex- "penses and thus reduce the price of their commodities to the "public. Still more if A and B, each owning half a carload of "potatoes, should agree to ship together in order to obtain car- "load rates, thus enabling them to sell lower in the markets, "they would violate this act. Not only under this act is it im- "possible for citizens to enter into the simplest partnership "without violating it, but they cannot enter into a joint stock "association or corporation, for that precludes competition be- "tween those combined. And this forms so necessary a part of "the daily business affairs of men that its prohibition would in- "terfere with and prevent business as now conducted and con- "sequently to make that criminal is to interfere with the lib- "erty of the citizen."

Observe that in the case last quoted from the law forbade any combination or co-operation between persons carrying on business which might prevent competition, but went too far in that direction, while in the case before this Court the law forbids any combination or co-operation which might affect injuriously and in the way of trade competition an existing business.

Again for example: Where two or more persons conspired to dispose of their property fraudulently so as to hinder and defeat their general creditors whereby the latter lost their demand or debt as in *Adler vs. Fenton*, 24 How., 407 to 413, this Court said:

"To enable the plaintiffs to sustain an action on the case "like the present it must be shown that the defendants have "done some wrong, that is, have violated some right of theirs "and that damage has resulted as a direct and proximate conse- "quence from the commission of that wrong. The action cannot "be sustained because there has been a conspiracy or combina- "tion to do injurious acts."

Here there was a combination or conspiracy and there was loss, but the plaintiffs were general creditors, having no lien upon or legal right in the property conveyed away, and there

being no legal right of the plaintiffs violated by the act of the defendants there was merely *damnum absque injuria*.

Again for example: Where a plumbers' association agreed to withdraw its patronage from all wholesale dealers who would sell to any who were not members of the association, as in *MacCauley vs. Tierney*, 37 L. R. A., 455, the Court said:

"It is doubtless true, speaking generally, that no one has a "right intentionally to do an act with the intent to injure an- "other in his business. Injury, however, in its legal sense, "means damage resulting from a violation of a legal right. It "is this violation of a legal right which renders the act wrong- "ful in the eye of the law and makes it actionable. If, there- "fore, there is a legal excuse for the act it is not wrongful even "though damage may result from its performance. The cause "and excuse for the sending of the notices, it is evident, was a "selfish desire on the part of the members of the association "to rid themselves of the competition of those not members with "a view to increasing the profits of their own business. The "question then resolves itself into this: was the desire to free "themselves from competition a sufficient excuse in legal con- "templation for the sending of the notices? We think the ques- "tion must receive an affirmative answer. Competition, it has "been said, is the life of trade. Every act done by a trader for "the purpose of diverting trade from a rival and attracting it to "himself is an act intentionally done and insofar as it is suc- "cessful, to the injury of the rival in his business, since to that "extent it lessens his gains and profits. To hold such an act "wrongful and illegal would be to stifle competition. Trade "should be free and unrestricted, and hence every trader is left "to conduct his business in his own way and cannot be held "accountable to a rival who suffers a loss of profits by any- "thing he may do so long as the methods he employs are not of "the class of which fraud, misrepresentation, intimidation, co- "ercion, obstruction or molestation of the rival, or his servants "or workmen, and the procurement of violation of contractual "relations are instances."

Observe that Courts may differ as to what constitutes intimidation, or coercion, but there is no such question in this case. What the defendants are charged with doing is offering business advantages to those patrons who refuse to deal with their competitor at the advanced prices of their competitor, thus securing to themselves the exclusive patronage of all those

who leave their competitor, the Journal, by reason of its advance in prices.

Observe further that the case last cited states that to hold such an act wrongful or illegal would be to stifle competition, which is our claim in the case at bar, and if this is correct it decides the case at bar because the legislature of a state cannot stifle competition without interfering with liberty, and it cannot interfere with liberty without coming within the scope of the Fourteenth Amendment of the Federal Constitution. Elsewhere in this brief we present the question of the entire lack of public interest in the acts charged against the defendants. In fact public interest is rather advanced than hindered by the acts charged.

Again for example: Where persons in the same business concerted, associated, mutually agreed, and conspired if you will, that they would not deal with any manufacturer or wholesale dealer who would sell lumber directly to consumers at any point where a member of the association was carrying on a retail lumber yard, this was held lawful and proper in *Bohn Mfg. Co. vs. Northwestern Lumbermen's Association*, 21 L. R. A., 337. It seems to us that the right to do the things above asserted goes much farther than the mere association of the defendants in this case to refuse the use of their columns (except upon condition) to advertisers who are willing to pay their competitors its increased price. In the case last cited the Court said:

"The case presents one phase of a subject which is likely to "be one of the most important and difficult which will confront "the Courts during the next quarter of a century. This is the "age of associations and unions, in all departments of labor and "business, for purposes of mutual benefit and protection. Con"fined to proper limits both as to end and means, they are not "only lawful, but laudable. Carried beyond those limits they "are liable to become dangerous agencies for wrong and oppres"sion. Beyond what limits these associations or combinations "cannot go without interfering with the legal rights of others is "the problem which in various phases the Courts will doubtless "be frequently called to pass upon. There is perhaps danger "that influenced by such terms of illusive meaning, as 'monop-

"'olies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be "lead to transcend the limits of their jurisdiction and like the "Court of King's Bench in *Bagg's Case*, 11 Coke, 98a, assume "that on general principles they have authority to correct or "reform everything which they may deem wrong, or as Lord "Elsmere puts it, 'to manage the state.' * * * There was "no element of fraud, coercion or intimidation either towards "plaintiff or the members of the association. True, the secre- "tary in accordance with Section 3 of the by-laws made a de- "mand on plaintiff for 10 per cent. on the amount of the two "sales. But this involved no element of coercion or intimida- "tion in the legal sense of those terms. It was entirely optional "with plaintiff whether it would pay or not. If it valued the "trade of the members of the association higher than that of "non-dealers at the same points, it would probably conclude to "pay, otherwise not. * * * The mere fact that the pro- "posed acts of the defendants would have resulted in plaintiff's "loss of gains and profits does not of itself render those acts "unlawful or actionable. That depends on whether the acts are "in and of themselves unlawful. 'Injury,' in its legal sense, "means damage resulting from an unlawful act. Associations "may be entered into the object of which is to adopt measures "that may tend to diminish the gains and profits of another, "and yet so far from being unlawful they may be highly meri- "torious. *Com. vs. Hunt*, 4 Met., 111; 38 Am. Dec., 346; *Mogul "S. S. Co. vs. McGregor*, L. R. 21; Q. B. Div., 544. If an "act be lawful—one that the party has a legal right to do—the "fact that he may be actuated by an improper motive does not "render it unlawful. As said in one case, 'the exercise by one "'man of a legal right cannot be a legal wrong to another'; or as "expressed in another case, 'malicious motives make a bad case "'worse, but they cannot make that wrong which in its own es- "'sence is lawful.' *Heywood vs. Tillson*, 75 Me., 225; 46 Am. "Repts., 373; *Phelps vs. Nowlen*, 72 N. Y., 39, etc. * * * "What one man may lawfully singly do two or more may law- "fully agree to do jointly."

The last observation is, of course, by the subject under discussion, applicable to and limited to trade competition and combinations for that purpose, and necessarily so because there can be no competition, and indeed no trade, without co-operation and combination.

The foregoing cases present under a variety of circumstances rulings and observations of Courts upon the related questions of *damnum absque injuria*, combination in trade,

competition and liberty to contract and carry on trade and business. Many other cases could be cited to like effect. But we stop to inquire at this point: In what way and to what extent has the statute in question (Section 4466a, Statutes of 1898) altered these rules of the foregoing cases?

II.

Omitting provisions of the statute in question not counted upon in the information in this case we find that the statute includes in its interdict all persons who combine or associate for the purpose therein stated. No matter whether the means employed by such persons be lawful or unlawful, authorized or unauthorized, acts they have a legal right to do, or acts they are compelled by law to do, because the question of means is wholly taken out of consideration by the general words of the statute, "by any means whatever." The statute in question was evidently written from the view point of the well-known, much quoted saying, that a conspiracy is a combination of two or more persons to do an unlawful act by any means or to do a lawful act by unlawful means." The effect of adding the words, "by any means whatever," was perhaps different from what the draftsman of the law expected or suspected. The statute as now written covers only conspiracies where the object or purpose of the combination is unlawful. What objects or purposes are to be considered unlawful *is not stated in the statute except by these words: "Wilfully or maliciously injuring another in his trade, etc."*

Obviously if we were obliged to go to the common law to ascertain what acts shall be considered "wilfully or maliciously injuring another in his trade," the information in this cause would state no offense and would be subject to demurrer within the foregoing quoted and indeed within all the authorities, because by the common law

(a) It was not an *injury* to attract away one's customers by offering or what is the same making it to his disadvantage to deal with one's competitor and so secure his whole patronage.

(b) It was not an injury for several to combine to do this because combination and co-operation are necessary and essential elements of all trade and all competition.

(c) The common law did not hold one responsible for the ulterior motives with which he exercised a legal right.

(d) At common law malice was never inferred from the commission of an act which the party had the legal right to commit.

Now let us see what our information charges. (Record, pp. 16, 17, 18.)

First—It charges in the words of the statute that the defendants did unlawfully conspire, etc., for the purpose and with the intent of wilfully and maliciously injuring the Journal Company and its stockholders without in this sentence in any way showing of what the injury consisted. This, of course, standing alone would have been insufficient. Bishop Stat. Crimes, 2nd ed., Sec. 447.

Second—The information then goes on to show that the three persons accused were business managers of three corporations and that said three corporations were engaged in competition with the Journal and with one another in the business of publishing newspapers and *receiving advertisements for hire*. They are all at Milwaukee. It is the business and trade of the Journal Company to "solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons," and it had a large number of advertisers or patrons from whom a large portion of its revenue was derived and it therefore for reasons given which no doubt seemed sufficient to it raised its prices or advertising rates about 25 per cent. over former prices.

The Evening Wisconsin was also a newspaper in the same field of business, "advertising for hire." (p. 17.) The Milwaukee Sentinel was also a newspaper in the same field of business and "advertising for hire." (p. 17.) The Daily News was also a newspaper in the same field of business and "advertising for hire." (p. 17.)

The three business managers of these competitors met on

April 5th, 1900, and agreed, *and we are now informed for the first time in the information what the purpose of the combination was and what the "injury" was.* The accused are charged with agreeing, etc., that *if any person should pay or agree to pay the Journal Company the increased rate of advertising established or fixed by it, then and in such case such person should not be permitted to advertise in any of said other three papers.*

Suppose the agreement stopped right here or the information stopped right here, would it state any offense at common law? Could not the defendants as in the cases hereinbefore cited combine their property, their business advantages or their talents and say to all the world, "We will only receive 'advertisements for hire' from those who give us their whole patronage"? If they could do so, (having one competitor), is it not a mere equivalent to say that they will not receive "advertisements for hire" from any merchant or other person who patronizes this one competitor? Is not this done every day in trade and in the professions? Was not this and more than this done and declared to be lawful in the Mogul S. S. Co. case supra? But the information shows that the accused in the case at bar did not carry their competition so far. It can hardly be claimed that if they had the right at common law to singly or together close their columns absolutely to all who would patronize the Journal, they did not possess the lesser right to close their columns absolutely *to a certain class only of those who patronized the Journal, viz.:* such of the Journal's customers who paid it the recently advanced prices? But the information shows that the accused did not carry their competition even thus far. They did not, as they might have done, agree to close their columns *absolutely* to those of the Journal's patrons who paid or agreed to pay its advanced prices, but only conditionally. That is to say the three associated newspapers would not make contracts of "advertising for hire" with that class of the Journal's customers as were willing to pay the Journal its advanced prices unless such customers would also advertise in the three associated or combined newspapers and pay there-

for at the Journal's rates. We submit that this was entirely within the common law by all the authorities and that the information showed no offense committed. But as we understand the decision of the Supreme Court of Wisconsin in this case on habeas corpus that Court *could not see that this particular form of competition would be beneficial to the three combined newspapers* and therefore inferred malice (either as matter of fact or law as we shall discuss hereafter) and so brought the act in question within the statute in question as a sort of malicious competition or a malicious combination. The inquiry here again separates into two lines, which we must separately pursue.

1. Can there, from the face of the information, be derived any legitimate purpose of competition from the acts of the accused?

2. If this Court is able to say, from the information alone without here considering the plea, as the Wisconsin Supreme Court said in the habeas corpus case, that there could be no competitive purpose served by the acts charged against the defendants, still can the defendants by law be deprived of their liberty to contract collectively or individually with whom they choose and at what rates they choose and upon what terms they choose, including terms which prohibit, either absolutely or conditionally, their customers from dealing with a competitor

III.

First.

Can there be from the face of the information derived any legitimate purpose of competition?

Because the statute in question, Section 4466a, does not add anything to the common law by specifying or defining what acts shall constitute malicious injuries to "his reputation, trade etc."; but merely forbids combination for that purpose, we can look nowhere but to the common law to ascertain not only what acts constitute malicious injuries to reputation or trade, but also to ascertain what acts are authorized by the common law

in the exercise of trade competition, for if the acts under consideration are authorized by law they *cannot at the same time be malicious injuries.* That is, they cannot at the same time be authorized and unauthorized by law.

The Supreme Court of Wisconsin seems to have been misled by the fact that the tendency of the agreement or concert for which the accused are prosecuted is to reduce prices. That Court refused to believe or infer that the defendants could have been influenced by philanthropic motives and rather jumped at the conclusion that there are only three classes of motives, namely: selfish, philanthropic, or malicious. From a narrow and inexperienced view of trade relations the Court found no sufficient selfish motive and refusing to believe there was a philanthropic motive readily came to the conclusion that there must have been a malicious motive. This, of course, does not follow at all. Motives are more multiform and less capable of classification. This is illogical as presuming guilt. That is the Court cannot see any good in the way of competition and because it cannot, it infers malice, that is to say, it infers guilt.

This malice in fact or malevolent intent is inferred from an act not forbidden by law, and from an act which caused loss, not injury, and which the Court holds only was unlawful because it was malicious and only malicious because it did no good to the accused and caused loss to a third person.

Observe that malice figured out in this way is "malice in fact," and not the malice which the law infers from the wilful commission of an unlawful act. But notwithstanding the decision of the Supreme Court of Wisconsin we respectfully submit, that the fact that the tendency of the concert or agreement of defendants was to reduce prices, has nothing to do with the question here under discussion, except, perhaps, to show, [to borrow a phrase from Blackstone], there was no "public wrong." How can it be made the basis of the inference of malice, hence of the inference of guilt, that the tendency of the concert or agreement charged was to reduce prices? In order to arrive at this conclusion we must assume that the Journal will recede from its prices. Is it not more correct to state it in

this way: The object of the combination or concert charged was to win away from the competitor, the Journal, and to the associated three newspapers, all its customers who required more than one newspaper in which to do their advertising or to whom the offer of the three associated defendants was more attractive for any conceivable reason than the offer of the Journal at its increased rates. It is altogether erroneous, we submit, in treating this question to begin with a guess or surmise or deduction that the motives of the associated three defendants were not selfish and were malicious because the Journal would reduce its prices and therefore the prices of advertising on the whole go back to the old basis. It is altogether erroneous to assume, as the Wisconsin court did, that the advertisers who left the Journal would not go into the associated papers. If they did not intend to go into one or more of the three associated papers they would not be affected by the agreement of the defendants at all, but would continue with the Journal. We submit that the inquiry rather is, Was the object of the association of the three accused lawful without first regarding motives? If found lawful no necessity for inquiry into their motives exists. Did the accused have the right at common law, all being competitors, to associate together and refuse to let their columns for hire to each and all advertisers who did not deal with them exclusively? The authorities heretofore cited seem to say that they had that right. If they had that right did it follow that they could not do what is the same thing put in other words, namely: singly or jointly refuse the use of their columns absolutely to anyone who patronized any competitor or a designated competitor? We understand that the authorities are uniform that they had that right. We do not understand that the Supreme Court of Wisconsin denies this right to contract with whom they please and on what terms they please even without reference to competition. Because in *State ex rel. vs. Kreutzberg*, 114 Wis., 530, where a statute under consideration and there held unconstitutional made it a misdemeanor for any person or corporation to discharge an employee

"because he is a member of a labor organization," that Court said, at pages 545, 546, op:

"Confining ourselves then to the act so charged and the "statutory prohibition involved, is it within the legislative "power to make criminal the refusal to contract with another "for his labor *for any reason the employer deems cogent*"?

The Court answered this self-imposed question in the negative. So that recognizing the right of the accused to contract with whom they please and to refuse to contract with whom they please, that Court because it believed the tendency of the contract is to reduce prices and because it could not credit the accused with philanthropic motives assumed that there could be no benefit in the way of trade to the accused from their association and that therefore their action was malicious in fact and therefore unlawful and criminal. This is the real decision of the Wisconsin Supreme Court and it is unconstitutional as interfering with the liberty of contract not only by the decisions hereinbefore quoted, but by the decision of that same Wisconsin Supreme Court in *State ex rel. vs. Kreutzberg*, 114 Wis., 530. But before going any further along this line *and while denying that it is at all a proper inquiry in the case at bar*, let us instance some of the decisions and some of the dicta of Courts which go to show that there is a proper and lawful competitive motive in imposing a burden or differential against those customers who patronize a competitor, or what is the same thing, in offering lower prices, or any other advantage to those customers who give the associated traders their sole patronage.

First is the case of *People vs. Gillson*, *supra*, which shows that a statute is not valid which restrains one in the free enjoyment of his faculties which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business or occupation. Also suggests that a trader may sell at a loss in good faith in order to create a demand for an article out of which demand he will make a profit in the future. Also that he may give away one article and receive his profit or remuneration in some other direction or from some other article in which he deals or trades.

This is much stronger than what we claim for the accused in the case at bar. They are publishing newspapers and selling advertising for hire. Suppose there were no other feature in the case. Have they not a right to make themselves favorably known to the community and advance their interests along other lines by advocating and compelling lower prices for advertising? Or take another case: *Steamship Co. vs. McGregor, supra.* There the effort was to drive the competitor out of trade and to acquire the whole trade to the defendants. Suppose the Journal could not compete with the associated defendants at the old rates and their combination to reduce the rates of advertising for hire would result in such loss to the Journal that its competition would be utterly destroyed and its publication suspended, would they not have a right to do so under the case last cited?

Again, take the case of *Anderson vs. U. S., supra.* There the parties associated together for the purpose of refusing to trade at all with or recognize certain competitors and to refuse all business relations with them unless they joined the association and became members. In the case at bar, unless they refused to accede to the raised prices of the Journal. What is the difference?

See also *Scottish, etc., vs. Glasgow Fleshers, etc.*, 35 Scot. L. R., 645.

Again, take the case of *Bowen vs. Matheson, supra.* Greater damage the Journal could not have from this association than to destroy its trade utterly. That is not claimed in the case at bar, but, says the Court in *Bowen vs. Matheson, supra* (503 cp.):

"If their effect is to destroy the business of shipping mas-
"ters who are not members of the association, it is such a re-
"sult as in the competition of business often follows from a
"course of proceeding that the law permits. New inventions
"and new methods of transacting business often destroy the
"business of those who adhere to old methods. Sometimes as-
"sociations break down the business of individuals, and some-
"times an individual is able to destroy the business of asso-
"ciated men."

Or, take the case of *Ducber Watch Case Co. vs. E. H. Watch & Clock Co., supra*, where it is said (p. 645):

"It is a business device probably as old as business itself to "seek to increase the number of one's customers and the extent "of their purchase by treating more favorably those who be- "come exclusive customers. Certainly there is nothing unlaw- "ful or unfair in the statement to the trade by the maker of any "kind of merchandise, 'My goods are for sale only to those who "'will buy from me exclusively, not to others.' And the case "is in no way different if a half a dozen individuals combine "into a partnership."

Also consider the cases cited in this brief *supra* as instances of acts of trade competition sanctioned by the Courts.

In order to understand the advantage to the accused from the association and agreement set forth in the information, it is necessary to consider the nature of the business of advertising for hire. From the viewpoint of the advertiser who may be called the trader it is desirable to bring to the attention of the greatest number of persons eligible as customers for his particular line of trade at the minimum of expense, the fact that he is in trade, the location of his place of business and the advantages of trading with him growing out of the cheapness of his prices, the quality of his goods, convenience of access, or any other advantage he may offer, including prizes and discounts for exclusive patronage.

The advertising trader has to consider not alone the circulation of the newspaper or newspapers which he employs (although that is an important factor), but the nature of his business with reference to the class who read a particular paper or group of papers, and in the case of two or more newspapers whether or not they cover the same or different classes of readers, for he knows that the same class of readers is not reached by the St. James Gazette and the Daily Mail, nor by the New York Sun and the New York Journal, nor by the Review of Reviews and Munsey's. He also knows that papers, republican in politics, are usually read by republicans, democratic in politics, read by democrats, and labor newspapers by

members of labor organizations, and that the various religious sects and some nationalistic factions in this country have their newspapers in which each sect, race or faction has great confidence and that class of citizens can ordinarily be reached by an advertisement only through its particular newspaper. He knows there are a few newspapers more generally taken which to some extent circulate among all classes of readers, but at the same time no one paper reaches all classes. Turning to the field of advertisers, we find all the kinds of trades represented, the sale of proprietary medicines, shoes, clothing, food stuffs, jewelry, dry goods, horseshoeing, places of amusement, situations wanted, certain kinds of professional work, and, in short, the whole various and kaleidoscopic field of trade. A few general stores, like the few newspapers of quite general circulation, offer to cover by their sales more of the great army of human wants than other advertisers, but none pretend to cover all. The advertising trader knows further that it would be quite a waste of money to advertise overalls in a newspaper read mostly by the wealthy and leisure class, or to advertise diamonds or champagne in a labor newspaper. And if he is selling a special or particular line he knows that his customers must be sought from among the readers of more than one newspaper *because the classification of newspaper readers is never coincident with the classification of eligible customers* with reference to any trade and if he is in a more general trade, such as the dry goods line where the one touch of nature makes the whole feminine world kin, he must, for illustration, be content with bringing his business to the notice of a fraction of the community unless he advertise in the republican as well as in the democratic daily and in the labor newspapers as well as in the socialistic and to some extent at least in the newspapers representing and read by religious sects. From the viewpoint of the newspaper proprietor, or what is the same thing, the servant of the newspaper proprietor, it is desirable to present to the advertising trader, his patron, the greatest number of the foregoing desirables at the lowest possible price and thus secure as much patronage as possible. He knows that his newspaper alone

reaches only a certain class of readers and that the number of possible patrons is limited and the greatest variety exists both in the kind of articles and services advertised.

Now it is a mistake to consider that the contract of advertising for hire made with a newspaper is necessarily or even usually for any fixed period, or that it is continuous. The prices per inch of space are continuous, but the advertising trader inserts a variable number of inches in various newspapers, that is on one day he will advertise in newspaper A and on the next day in newspaper B, on the third day in newspaper C, on the fourth day in newspapers A and C, and on the fifth day in all three, and so on. In view of these conditions, what trade advantages could accrue to the three associated newspapers accused from the agreement set out in the information? Let us submit here that any one single trade advantage is sufficient and that the inquiry is not what advantages are certain to accrue, but what advantages are possible. First and simplest is the question of the number of readers which the three associated newspapers can present to the advertising trader. If the total circulation of some one of the associated newspapers was less than that of the Journal competitor, but the combined circulation of the three associated newspapers were equal to or greater than three times the circulation of the Journal, there is a direct offer to the advertising patron to reach three times the number of people with his advertisements at 25 per cent. less cost per capita. Also if the circulation of each one of the three associated papers were less than that of the Journal, but putting all their circulation together, it amounted to only 10 per cent. less than three times the circulation of the Journal, the agreement set forth in the information offers to the advertising patron a reduction in the cost of advertising per capita of readers, of 15 per cent. In both the foregoing cases it presumably secures the patronage to the accused.

If this is a proper subject of inquiry by the court, we submit that the foregoing is a sufficient trade advantage and that where the readers of the three papers constitute the requisite variety of classes or sects the agreement charged is mutually

beneficial to the three accused and to the advertising trader. To the former in securing patronage and to the latter in securing the variety of readers that he desires.

Second—To the advertising trader who desires to advertise only in one newspaper it offers him a saving of 25 per centum and tends to secure his patronage to some one of the associated newspapers rather than to the Journal. This, we submit, is sufficient alone. It forces the selection of one of the accused by the lower price in all cases except where by reason of a supposed greater reading constituency by at least 25 per centum the advertiser might select the Journal.

Third—To by far the larger class of advertising traders who desire to have an advertisement appear one day in one newspaper, the next day in a different newspaper, and the third day in still another, so as to reach different classes of readers, the agreement described in the information is a direct inducement to select his several papers from among the three associated newspapers and so save 25 per centum and the patronage which otherwise would have been divided between four newspapers, each securing approximately one-fourth, is now divided between three newspapers, each securing approximately a large fraction, or one-third. This alone is sufficient interest. This result would not be possible without the provision in the agreement that those who select the Journal shall not be permitted to advertise in either of the other papers unless he advertise in all.

Fourth—The agreement set forth in the information is an inducement to the advertising trader to select any two of the associated newspapers rather than the Journal and one of the associated newspapers, and also an inducement to select the three associated newspapers rather than the Journal and any two of the associated newspapers and thus secure to each of the associated newspapers a greater volume of patronage by the difference between one-third and one-fourth of all the last class of patrons. This alone is sufficient.

The agreement is based upon the supposition, of course, that the Journal will persist in its raise of rates. It was to meet

and take advantage of this business mistake on the part of the competitor that the agreement was made and there is no provision made for the Journal going back to the old prices because in that event the association on the lines laid down in the information would be nugatory and also impossible. That the agreement or association charged was efficacious to secure to the accused additional trade is also shown by the information, where it is stated that several advertising traders left the Journal. Presumably they did not retire from business or go into a monastery, because under the agreement charged they had no reason to quit the Journal unless they desired to go into one or all of the associated newspapers. To the advertising trader who did not so desire the agreement charged had no force or effect whatever.

Fifth—It is, or at least they may honestly think it is, to the interest of the associated newspapers that the prices of advertising for hire should not be raised too high so as to decrease the volume of newspaper advertising or divert it into other modes of advertising and as from motives of class interest associations of lawyers fix and regulate fee bills, associations of laundrymen regulate laundry charges, associations of laborers fix upon the wages they will demand, and associations of insurance companies, manufacturers, and, in short, all traders fix upon rates, so the associated newspapers had an interest in fixing rates so as to benefit themselves or their trade and were well within their rights by excluding from their concert or association each and all who charged higher rates. (*Allgeyer vs. Louisiana, infra.*) To sum up on this point so far as covered by the foregoing:

The information shows that a competing newspaper, the Milwaukee Journal, raised its advertising rates about 25 per centum above its then existing rates. Three competitors refused to raise their advertising rates and met their competitor's raise of prices by adhering to and offering the trade their service and their columns at the old rate, except that all advertisers who paid or agreed to pay the Milwaukee Journal its recently increased rates should have their advertisements ac-

cepted by the three associated newspapers in case such traders desired to advertise in any of the three associated newspapers only upon condition that such traders advertised in all the other three associated newspapers and paid to each a corresponding advance in rates. It will be observed that this agreement concerned property impressed by no public use, that it concerned only what private persons could do or refuse to do with their own private property, that no question of public health, morals or welfare was affected thereby, that it was done in the exercise of trade competition, that its tendency was to keep prices down, or in the alternative secure to the person making the agreement a larger proportion of the advertising trade, that it is impersonal in its aim and directed only against a policy, that it was done to injure a competitor only in that sense of the word "injure" which covers causing a loss of custom by winning away its customers, and that only in case the competitor persisted in its attempt to raise prices that advertising traders were still left free as before to select and bargain with either or all the newspapers except that it was more advantageous to said advertising traders to select one of the associated three newspapers instead of the Journal, two of the associated three newspapers instead of the Journal, and one of such associated papers, and the three associated newspapers instead of the Journal and two of such associated newspapers, thus offering a direct discount or advantage to all those advertising traders who did either of the three last mentioned things, and so securing their patronage to be distributed among the three associated newspapers.

Lastly we desire to present a phase of this matter which seems to us to show with a certainty quite equal to mathematical demonstration the advantage to the accused of the trade arrangement.

The trade advantage to the three associated newspapers arising from their refusal to contract with any person who employed the Journal and paid its increased rates, except upon condition that such person employed all the three associated newspapers and paid each at a rate equal to the Journal's rate,

was direct, immediate and certain. This requirement or condition was not addressed to and could not affect in the least the action of any customer or patron of the Journal who had no desire to also employ one or more of the associated newspapers. Neither was it addressed to nor could it affect in the least in causing him to leave the Journal the action of those advertising traders who *required* four or more newspapers. This last class of advertisers was in nowise affected because *requiring* four they must perforce patronize all three associated newspapers and also the Journal and would be charged by each at the same rate. It therefore was addressed to and affected the action of *only those advertising traders who desired to advertise in two or three newspapers.* By the terms of the proposition all who desire less than two and all who desire more than three are entirely unaffected. Now to this last class of advertisers who desire two or three newspapers the agreement of the accused offered the advantage of a lower rate if such advertisers would *select their two or three newspapers from the associated newspapers.* Presumably experience warranted the accused in believing that few if any advertisers would require more than three newspapers. But be that as it may, the foregoing, we respectfully submit, shows with unanswerable precision that the agreement of the accused tended to secure to them the usual trade advantage of the exclusive patronage of a class, presumably the largest class, of advertising traders.

IV.

Second.

If this Court is able to say from the information alone (without here considering the plea) as the Wisconsin Supreme Court said in the habeas corpus case, that there could be no competitive purpose served by the acts charged against the accused, still can the accused by law be deprived of their liberty to contract, collectively or individually, with whom they choose and at what rates they choose and upon what terms they choose, including terms which prohibit either absolutely or conditionally their customer from dealing with their competitor?

This turns upon the question whether there is secured to the citizen by the constitution the right of *freedom of contract with whom he pleases and to refuse to contract with whom he pleases without giving any reason therefor.* We maintain that there is such constitutional right and that without going to this extent there is no such thing as liberty to contract. We distinguish the strike and boycott cases where the alleged wrongdoer is not merely exercising a right to contract or to refuse to contract himself, but goes out to the public and to persons with whom he has no contract relations and threatens, coerces or even persuades such persons not to deal with or patronize another whom he thereby seeks to coerce into some particular course of conduct. We shall take up this latter class of cases in another section of this brief. In that class of cases there is usually no question of the liberty of contract. Because all unlawful strikes and all boycott cases take this form, viz: The interested strikers or boycotters first refuse to continue contract or social relations with the person to be coerced except upon condition that he accede to their demands. So far their action involves the question of liberty to contract or refuse to contract; but so far the Courts hold their action legal. But finding this ineffectual, and only when they find this ineffectual, the strikers and boycotters take a step further and try to prevent by threats or persuasion others from entering into contract or social relations with the person to be coerced. *In favor of this last step in the strike or boycott the striker or boycotter could no more invoke the law of liberty to contract than he could in justification of any other act of his which did not consist in the making of a contract or in the refusal to make a contract.* But we will take up the strike and boycott cases hereafter and here confine ourselves to the question whether liberty to contract involves the right to make or refuse to make lawful contracts without any inquiry into the motive of their making or refusal.

One of the latest cases on this subject is *Coffeyville Vitrified Brick & Tile Co. vs. Perry,* decided May 7, 1904, by the Supreme Court of Kansas and reported in the 76 Pacific Re-

porter, page 848. The statute of the State of Kansas under consideration in this case made it a misdemeanor for any person to prevent employees from joining any labor organization and provided that any person that coerces or attempts to coerce employees by discharging or threatening to discharge them *because of their connection with a labor organization*, should be punished by a fine and also subject to civil action for damages. The Court held this statute unconstitutional, saying:

> "Before approaching a discussion of the question let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety or morals of the community or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes it is not a police regulation. Besides the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the constitution under the guise of a police regulation. * * * The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from unwarranted seizure or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the constitution."

In *State ex. rel. Zillmer vs. Kreutzberg*, 114 Wisconsin, 530, the statute under consideration was in these words: (Chap. 332, Laws Wis., 1899.)

> "Section 1. No person, corporation, agent or officer on behalf of any person or corporation, shall coerce or compel any person or persons into an agreement, either written or verbal, not to join or become a member of any labor organization as a condition of such person or persons securing employment or continuing in the employment of any such person or corporation and no person or corporation shall discharge an employee *because he is a member of any labor organization.*"

The prosecution under this statute was for unlawfully discharging an employee *because said employee was a member of a labor organization*. The Wisconsin Supreme Court held this

statute unconstitutional and we quote from that opinion, as follows: (pp. 533, 534.)

> "It has become settled, for example, that 'liberty' does not mean merely immunity from imprisonment and that 'property' is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by freemen and the right of each individual to regulate his own affairs so far as consistent with the rights of others, and within the latter, those rights of possession, disposal, management and of contracting with reference thereto which render property useful, valuable and a source of happiness, right to pursuit of which is preserved." Citing authorities.

The Wisconsin Supreme Court cites from the decision of this Court in *Allgeyer vs. Louisiana*, 165 U. S., 578, as follows:

> "The liberty mentioned in that (XIV.) Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

It is said that in *Carew vs. Rutherford*, 106 Mass., 1, in *Allen vs. Flood*, 1898, App. Cases, 1, and in *Doremus vs. Hennessey*, 176 Ill., 608; 52 N. E. Rep., 924, these several Courts sustain the right of labor unions or labor organizations to contract or refuse to contract with whom they please and that the right of such persons to contract or refuse to contract, or of such organization so to do, was now protected by law. The Wisconsin Supreme Court further said in the case under consideration: (pp. 535, 536.)

> "In the somewhat famous case of *Arthur vs. Oakes*, 11 C. C. A., 209; 63 Federal, 310, wherein the Circuit Court during the labor troubles of 1894 enjoined certain employees *from so quitting * * * as to cripple the property or prevent or hinder the operation of the railroad*, the Court of Appeals, speaking by Harlan, J., held

that was erroneous as invading the natural rights of men. He said: 'It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another.' 'The rule we think is without exception that equity will not compel the actual affirmative performance by an employee of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character.' It was there further held that it was error to enjoin the employees from striking for the reason that included in the meaning of the word 'strike' was the mere concurrence of a number of individuals in the exercise of their inherent right to quit their employment, *which no Court ought to interfere with unless they were bound by contract.*"

The Supreme Court of Wisconsin, and also many of the Courts in the cases hereinafter cited, have quoted with approval the following from Cooley on Torts, page 278:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, *whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice.*"

If this is law then the Supreme Court of Wisconsin has no authority under the XIVth Amendment to the constitution of the United States to *inquire at all into the motives of the associated newspapers for refusing to receive contracts of advertising from any person* who patronized the Journal Company. Accused had the right, according to these authorities, to refuse absolutely to contract. They are charged with refusing conditionally. The condition imposed here was advantageous to the accused, but we leave this out of sight at present.

"With his reasons (for refusing to contract with any par-"ticular person) neither the public nor third persons have any "legal concern." *Cooley on Torts,* p. 278.

Right here we might bring to the notice of the Court the case of *Wallace vs. Georgia, Etc. Railroad Co.*, 94 Ga., 732. There a statute of the State of Georgia required under penalty every incorporated railroad, express and telegraph company which discharged an employee to furnish to said employee in writing the reasons for such discharge. The Court held the

statute unconstitutional. Other reasons were given, but we cit
the case here merely to the point decided therein.

We do not question the right of the legislature or of th
Courts to declare that the motive with which an indifferent ac
is done may be inquired into, but we submit that there can b
no inquiry into the motive with which a legal, constitutiona
right is exercised without denying that right. If the state ca
inquire, for example, into the motive which induced a man t
refuse to make a contract of employment with another man an
punish him for such refusal if the motive accompanying suc
refusal is considered unworthy or malicious, the right to refu
is at an end. It becomes a mere conditional privilege instea
of a constitutional right. That is to say, he will be justifie
in refusing and will not be incarcerated for his refusal only
the tribunal which tries the issues of fact finds that his refus
to contract arose from no unworthy or malicious motive
Every decision of every Court which goes upon the ground tha
the right to make contracts or refuse to make contracts is
constitutional right negatives such contention, and the for
going authorities negative it in express terms.

In *State vs. Julow*, 129 Mo., 163; 31 S. W. Rep., 781; 2
L. R. A., 257, where a statute was held unconstitutional whic
provided, like the Wisconsin statute, that no employer *shou*
by any means attempt to compel or coerce any employee in
withdrawal from any lawful organization or society under pe
alty, the Court said:

"For the present purpose it will be assumed that defendan
"attempted to do the act with which he is charged and that
"lay in his power to compel or coerce Simonds to withdra
"from a lawful organization with which he was connected; b
"cause by so doing all discussion of matters merely prelim
"nary to the main question herein involved will be avoide
"* * * Here the law under review declares that to be
"crime which consists alone in the exercise of a constitution
"right, to-wit, that of terminating a contract—one of the esse
"tial attributes of property, indeed property itself, under pr
"ceding definitions. Brought to the bar of a Court on such
"charge the accused would have been prejudged in so far
"the criminality of the act is concerned. No question cou

"there be made or attempted as to the quality of the act. That "would have been settled by the previous legislative declara- "tion and it would only have remained to find the fact as "charged in order to declare the guilt as charged. But the fact "as charged, as already seen, is not a crime and will not be a "crime so long as constitutional guaranties and constitutional "prohibitions are respected and enforced. If an owner, etc., "obeys the law on which this prosecution rests he is thereby "deprived of a right and a liberty to contract and to terminate "a contract as all others may; if he disobeys it then he is pun- "ished for the performance of an act wholly innocent, unless, "indeed, the doing of such an act, guaranteed by the organic "law—the exercise of a right of which the legislature is for- "bidden to deprive him—can by that body be conclusively pro- "nounced criminal. We deny the power of the legislature to "do this, to brand as an offense that which the constitution "designates and declares to be a right and therefore an inno- "cent act; and consequently we hold that the statute which "professes to exert such power is nothing more nor less than a "legislative judgment and an attempt to deprive all who are "included within its terms of a constitutional right without "due process of law. * * * In conclusion it may be said "that there is a broad distinction between the invasion of a "right conferred by the constitution, to-wit, a right of property "carrying with it, as we have seen, all the liberties, attributes "and coincident rights which go to effectuate the principal "right, and those rights which are the mere creatures of legis- "lative gratuity where the legislature granting a privilege or "bestowing a bounty may of course, as no constitutional right "is involved, prescribe the conditions upon which the privilege "may be exercised or the bounty be obtained. This point finds "ample illustration in the recent cases of *Frisbie vs. U. S.*, 157 "U. S., 160; and *St. Joseph vs. Levin*, 31 S. W. Rep., 101."

In *People vs. Warren*, 34 N. Y. Supp., 942, the defendant was convicted of the crime created by statute of employing an alien as a laborer on contract work of a municipal corporation. The Court held the statute unconstitutional and said (p. 944):

"Personal liberty—that is, the right, among others, to make "contracts, to labor for others and to employ others to labor— "is secured by constitutional law to all members of this state "and the right is inalienable. *Greenhood Public Policy*, Rule "303; *In re Baker*, 29 How. Prac., 485."

Chicago vs. Hurlbert, 68 N. E. Rep., 786, 792 op. same point.

In *Commonwealth vs. Perry*, 155 Mass., 117; 28 N. E. Rep., 1126, the defendant was convicted under a statute which forbade under penalty the imposition of a fine by an employer upon his employees engaged at weaving for imperfections that may arise during the process of weaving. A majority of the Court held the statute unconstitutional on the ground that it infringed the right to acquire, possess and protect property, which included the right to make reasonable contracts which should be under the protection of the law. The dissenting opinion considered that the act of the legislature might be sustained on the ground that such fines were often used as a device to cover dishonest purposes and therefore that the power might be taken away from the employer of imposing any fine. But observe that the right asserted by the employer in that case was a right to make a particular form or kind of contract, while in the case at bar the right is denied to make any contract beneficial to the accused which might cause loss to a competitor if the accused entered upon the exercise of that right with malicious motives.

In *Carew against Rutherford*, 106 Mass., 1, this principle which we are here contending for was applied to protect parties against a conspiracy and to hold the conspirators liable to repay money extorted. In condemnation of the conspiracy the Court in that case said (p. 13):

"We have no doubt that a conspiracy against a mechanic "who is under the necessity of employing workmen in order to "carry on his business to obtain a sum of money from him "which he is under no legal liability to pay, by inducing his "workmen to leave him and by deterring others from entering "into his employment or by threatening to do this, so that he is "induced to pay the money demanded under a reasonable ap"prehension that he cannot carry on his business without "yielding to the illegal demands, is an illegal, if not a criminal "conspiracy; that the acts done under it are illegal and that the "money thus obtained may be recovered back, and if the parties "succeed in injuring his business they are liable to pay all the "damage thus done to him. It is a species of annoyance and "extortion which the common law has never tolerated. This "principle does not interfere with the freedom of business but "protects it. Every man has a right to determine what branch

"of business he will pursue and to make his own contracts with "whom he pleases and on the best terms he can. He may "change from one occupation to another and pursue as many "different occupations as he pleases and competition in busi- "ness is lawful. He may refuse to deal with any man or class "of men. And it is no crime for any number of persons with- "out an unlawful object in view to associate themselves to- "gether and agree that they will not work for or deal with cer- "tain men or classes of men or work under a certain price or "without certain conditions. *Commonwealth vs. Hunt*, 4 Met., "111; *Boston Glass Manufactory vs. Binney*, 4 Pick., 425; "*Bowen vs. Matheson*, 14 Allen, 499."

This covers our claim in the case at bar and it illustrates that the principle is not only a protection against prosecution but a protection against conspiracy of others. If a citizen is to be coerced by powerful combinations into making or refusing to make contracts against his will, he can answer this principle of law to show the illegality of the conspiracy against him; and if, under the guise of a state statute, he is prosecuted for conspiring to refuse to enter into contract relations with any man or body of men he can answer this principle in bar of the prosecution.

All this would be entirely unavailable if this constitutional right of liberty to contract or refuse to contract could be evaded by a statute permitting a judicial inquiry in every case into the intention with which that right was exercised. There is a distinction between different classes of legal rights in this respect. If the right is constitutional *and if it would be destroyed or impaired by an inquiry into the motives with which it was exercised*, then such inquiry is not permissible and is as unconstitutional as an absolute prohibition of the exercise of such constitutional right would be. So that the question in every case of this kind must be, Would a judicial inquiry into the motive with which the right is exercised impair or destroy the constitutional right? If it would, this indirect impairment or destruction is as unconstitutional as an absolute interdict. As is said in *Rideout vs. Knox*, 148 Mass., 368, 2 L. R. A., 81:

"We concede further that to a large extent the power to use "one's property malevolently in any way which would be law-

"ful for other ends is an incident of property which cannot be "taken away even by legislation. It may be assumed that un- "der our constitution the legislature would not have power to "prohibit putting up or maintaining stores or houses with ma- "licious intent and thus to make a large part of the property of "the commonwealth dependent upon what a jury might find to "have been the past or to be the present motives of the owners."

Take for illustration the case of an employer of labor, hostile to labor unions and, it may be, outspoken in his opposition thereunto. We have had notable instances of this recently. Now suppose a statute was enacted making it a crime or misdemeanor for any two or more persons to *wilfully or maliciously* refuse to employ a man because he was a member of a labor union. Would such statute be constitutional? If not, how is the statute in question constitutional and how can it permit an inquiry into motives? According to press reports, at a comparatively recent meeting of the national association of employers the president of that association in his opening address stated his belief that labor organizations were lawless bodies and promoted riots and disturbance. Why could he and his business associates not be prosecuted under this statute by any man who applied to him for work in the State of Wisconsin and who was at the same time a member of any of the denounced labor organizations and why could he not be convicted under this statute?

To hold that this right can only be exercised at the risk of prosecution in all cases and at the risk of conviction if malicious motives are found by the jury also merely points a way in which the constitutional right can be utterly extinguished. Two or more employers of labor choose to have their work done by employees who are not members of any labor union. They reject the proffered services of several labor men who apply to them and they employ instead inferior non-union workmen or they employ equally competent non-union workmen at higher wages than those wages demanded by the union men. Why are these employers not liable to criminal prosecutions under this statute? Upon the facts last aforesaid the Wisconsin Su-

preme Court could not see any advantage accruing to the associated employers from such refusal, hence the refusal must have been malicious and hence the persons refusing guilty, because the injury to the men refused was that they lost, like the Journal, an opportunity to earn money by working for hire, or, say, by "advertising for hire." We submit that a statute producing these result is necessarily unconstitutional and also that it cannot be gainsaid that the statute in question covers every phase of the hypothetical case last set forth. Again, suppose a person opened a grocery store or a livery stable in a residence district in a city where the residents were opposed to having such business carried on in their midst. Then these residents agreed together that for the purpose of inducing the grocer or livery stable keeper to quit business in that neighborhood they would not patronize him but would go several blocks further and even pay higher prices for their groceries or carriage hire to another grocer or livery stable keeper. Would not such residents not be within their rights and also within this statute in question?

V.

STRIKE AND BOYCOTT CASES.

We propose to show in this subdivision by an examination of the leading cases that the strike or boycott becomes an unlawful conspiracy, *not by reason of the refusal of the interested parties to assume or continue contractual relations with the persons to be coerced, which is a legal right*, but by reason of the strikers or boycotters going beyond this and preventing, even in some cases by persuasion, others with whom the strikers or boycotters neither have nor intend to have contract relations, from entering into contract relations with the person to be coerced.

One of the most extreme cases is *Erdmann et al. vs. Mitchell et al.*, 207 Pa., 79; 56 Atlantic Rep., 327; where the plaintiffs, certain laborers, were employed upon a building in course of construction and were not members of the particular labor as-

sociation to which defendants belonged. The defendants *were not working on this building,* but certain other members of defendants' union, who were satisfied with their employment, were so working. The defendants procured the discharge of the plaintiffs from such work by calling a strike and *inducing the members of their organization to quit work* at a critical time, and to the great pecuniary loss of the employer, unless the plaintiffs were discharged. The defendants were held liable, but the Court said:

"It is argued that defendants, either individually or by or-
"ganization, have the right now to peaceably persuade plaint-
"iffs and others not to work and their employer not to hire
"them. So they have. It is further argued that they can quit
"work when they choose. So they can. But neither of these
"suggested cases is the one before us. Here a strike on a large
"building was declared because plaintiffs would not join a par-
"ticular society. The declared purpose of the strike was to
"cause loss of employment to plaintiffs because they would not
"join the Allied Building Trades—chose to remain faithful to
"their own union, the Plumbers' League. The Allied Trades
"would not declare the strike off and permit work on the build-
"ing to proceed until the employers entered into a contract
"practically stipulating that they would discharge the plaint-
"iffs and not re-employ them. * * * The right (of plaint-
"iffs) involved is the right to dispose of one's labor with full
"freedom. This is a legal right and is entitled to legal protec-
"tion. The purpose of these defendants was to force the
"plaintiffs to join the defendants' association and to that end
"they injured the plaintiffs in their business and molested and
"disturbed them in their efforts to work at their trade. It is
"true they committed no acts of personal violence or physical
"injury to property, although they threatened to do something
"which might reasonably be expected to lead to such results."

Gray vs. Building Trades Council, (Minn.) 97 N. W. Rep., 663; is a late case which reviews the authorities and considers conspiracy to boycott. There the plaintiffs were electrical contractors and engineers and the defendant was an association consisting of a number of delegates and representatives from various labor organizations, all of which and each member of which was bound to obey the orders of the defendant on pain of being fined. The defendant undertook to classify the plaintiffs

as "unfair," which meant that all the labor unions or organizations represented by defendant, whether engaged in the same kind of business with the plaintiff or not, would refuse to work for, patronize or contract with, anyone who might employ the plaintiffs, and the defendant threatened the Minneapolis Industrial Amusement Association that in case it employed plaintiffs or contracted with plaintiffs the defendant would see that said last named association would be unable to obtain men for the construction of its buildings. The defendant was held liable and the Court said (p. 666):

"A boycott may be defined to be a combination of several "persons to cause a loss to a third person by causing others "against their will to withdraw from him their beneficial busi- "ness intercourse through threats that unless a compliance "with their demands be made the persons forming the combina- "tion will cause loss or injury to him; or an organization "formed to exclude a person from business relations with oth- "ers by persuasion, intimidation and other acts which tend to "violence and thereby cause him through fear of resulting in- "jury to submit to dictation in the management of his affairs. "Such acts constitute a conspiracy."

Also:

"While the Courts have invariably upheld the rights of in- "dividuals to form labor organizations for the protection of the "interests of laboring classes and *have denied the power to en- "join the members of such associations from withdrawing, "either singly or in a body*, even where such withdrawal in- "volves a breach of contract, yet they have very generally con- "demned those combinations usually termed 'boycotts' which "are formed for the purpose of interfering otherwise than by "lawful competition with the business affairs of others and de- "priving them by means of threats and intimidation of the "right to conduct the business in which they happen to be en- "gaged according to the dictates of their own judgment."

And again (p. 667):

"Labor may organize as capital does, for its own protection "and to further the interests of the laboring class. They may "strike and persuade and induce others to join them; but when "they resort *to unlawful means to cause injury to others* with "whom they have no relation, contractual or otherwise, the "limit permitted by the law is passed and they may be re- "strained."

The case of *Arthur vs. Oakes*, 11 C. C. A., 209; 63 Fed. Rep., 310; also illustrates this principle. Reduced to its simplest terms it may be stated correctly as follows: Upon a petition not disputed in the cause, stating that the railway employees were giving out and threatening that in a certain contingency they would suddenly quit the service of the receivers; by threats, force and violence would compel other employees to quit said service and by organized effort and intimidation prevent others from taking the places of those who might quit and would disable locomotives and cars so that they could not be safely used, etc., etc., a restraining order was issued prohibiting the workmen from doing many things not necessary to be here considered. The working men, by counsel, moved to strike out two paragraphs, or rather two propositions, from said restraining order on the ground that each of said two propositions went beyond the power of the Court to restrain or interdict. The proposition which we will call the first was stricken out on this ground and the proposition here called the second proposition was retained. By these propositions the workingmen were restrained:

"FIRST PROPOSITION.

"From so quitting the service of said receivers, with or "without notice, as to cripple the property or prevent or hinder "the operation of said railroad."

"SECOND PROPOSITION.

"From combining and conspiring to quit, with or without "notice, the service of said receivers with the object and intent "of crippling the property in their custody or embarrassing the "operation of said railroad."

The legal effect of the decision in this case is somewhat weakened by the consideration that the workmen were to be restrained, not convicted, and by the consideration that the railroad was a quasi public corporation and by the consideration that the primary question related to the exercise of the equity powers of the Court. But if the legal right of the parties was determined even when the question was presented in

this way, the decision is of some value in the case at bar. The Court held that the first proposition aforesaid went beyond the power of the Court below. We quote:

"The exercise by employees of their right to quit in conse-
"quence of a proposed reduction of wages *could not be made*
"*to depend upon considerations of hardship or inconvenience*
"*to those interested in the trust property or to the public.*"

With reference to the second proposition the Court considered that by its terms the employees were restrained from entering into a *conspiracy* for an unlawful purpose and on this ground sustained the second interdict. We quote:

"We have said that if employees were unwilling to remain
"in the service of the receivers for the compensation prescribed
"for them by the revised schedules it was the right of each one
"on that account to withdraw from such service. It was equally
"their right, *without reference to the effect upon the property*
"*or upon the operation of the road, to confer with each other*
"*upon the subject of the proposed reduction in wages and to*
"*withdraw in a body from* the service of the receivers because
"of the proposed change. * * * But that is a very differ-
"ent matter from a *combination and conspiracy* among em-
"ployees with the *object* and *intent* not simply of quitting the
"service of the receivers because of the reduction of wages, but
"of *crippling the property* in their hands and *embarrassing the*
"*operation* of the railroad. * * * The general inhibition
"against combinations and conspiracies formed with the object
"and intent of crippling the property and embarrassing the
"operation of the railroad *must be construed as referring only*
"to acts of violence, intimidation and wrong of the same nature
"or class as those specifically described in the previous clauses
"of the writ. We do not interpret the words last above quoted
"as embracing the acts of employees who, being dissatisfied
"with the proposed reduction of their wages, merely withdraw
"on that account, singly or by concerted action, from the service
"of the receivers, using neither force, threats, persecution nor
"intimidation towards employees who do not join them nor any
"device to molest, hinder, alarm or interfere with others who
"take, or desire to take their places."

We have here in one case two propositions decided, and the decision of each is authority, by analogy at least, upon the claim we make in the case at bar. These men were upheld in their refusal to enter into or continue contract relations and in

agreeing together for that purpose, without regard to whether the railroad property or its stockholders or creditors represented by the receivers sustained a loss thereby. Manifestly because the workmen in so doing were exercising a legal right which they possessed and the fact that such exercise caused loss to others or that the persons so exercising their legal right knew that its exercise would cause loss to others was not considered material. But the second proposition above set forth was sustained, but only on the ground that the inhibition against combinations and conspiracies therein contained was understood as referring only to acts of violence, intimidation and wrong of the kind and character described in other clauses of the injunction. In upholding the second proposition aforesaid the Court was only willing so to do when able to interpret the words contained therein as not covering the case of employees who, being dissatisfied at the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action. The Court also considers what would have been the law had the second proposition aforesaid received the construction which the Supreme Court of Wisconsin apparently gave the acts of the accused in this case. That is, if it could have been construed as covering the case of the exercise of a legal right but from bad motives. Upon that point the Court said (p. 321 of 63 Fd. R.):

"These employees having taken service, first with the com-
"pany and afterward with the receivers, under a general con-
"tract of employment which did not limit the exercise of the
"right to quit the service, their peaceable co-operation as the
"result of friendly argument, persuasion or conference among
"themselves in asserting the right of each and all to refuse
"further service under a schedule of reduced wages would not
"have been illegal or criminal *although they may have so acted*
"in the firm belief and expectation that simultaneous quitting
"without notice would temporarily inconvenience the receivers
"and the public. If in good faith and peaceably they exercised
"their right of quitting the service, intending thereby only to
"better their condition by securing such wages as they deemed
"just but not to injure or interfere with the free action of
"others they cannot be legally charged with any loss to the
"trust property resulting from their cessation of work in con-

"sequence of the refusal of the receivers to accede to the terms "upon which they were willing to remain in the service."

We submit that all this may be accurately summed up in the following propositions: It is lawful for two or more engaged in the same business to agree together to refuse to contract, or continue contract relations terminable at will, with another even though they do this with the knowledge or expectation that the exercise of this right on their part will cause loss to third persons or to a third person. But when they go beyond the acts necessary for the exercise of their right of liberty to contract, and combine or conspire to do some other act not essential (although convenient) to the exercise of their right and *which encroaches upon the legal right of some other person, and therefore wrongful,* they are liable. In short, the decision is in line with the proposition that no matter what loss or damage comes from the exercise of a legal right on the part of one person, or with what motive he exercises that legal right, he cannot be held answerable in the law.

Martell vs. White et al., decided by the Supreme Judicial Court of Massachusetts, March 1, 1904, and reported in 69 N. E. Rep., 1085, is an extreme case seemingly in conflict with *Bohn Mfg. Co. vs. Hollis, supra,* and cases cited in the latter opinion. But this conflict, if it exists, has no bearing on the question we present here for consideration because our position here brings us, we think, within the protection of all the precedents, however much they may disagree on minor or collateral questions. In the case of *Martell vs. White* the plaintiff was engaged in the business of quarrying granite and *selling it to granite workers.* The defendants were members of a voluntary association which aimed to include in its membership that class of persons who by reason of their business or occupation would be customers of the plaintiff and the association had a by-law authorizing the imposition of heavy fines upon any member, "having business transactions with any party or concern in Quincy or its vicinity not members hereof and in any way relating to the cutting, quarrying, polishing, buying or

selling of granite." The plaintiff was not a member of the association. His business was of the kind and at the place covered by the by-law and several members of the association were fined for dealing with the plaintiff who was fairly designated as to customers, location and kind of business by the by-law in question. It will be at once apparent that the defendants were not advocating the liberty to contract or refuse to contract for the members who did business with the plaintiff but were imposing heavy fines upon the members for the exercise of this very right. It was an attempt by association to put into force a rule of action (said by-law) which would under our contention here be invalid if enacted by the legislature of Massachusetts or Wisconsin because it imposed upon its members a fine upon the exercise of their right to contract with whom they pleased. The Court decided, rightly we think, that this was a legal injury to the plaintiff because it prevented by illegal means persons from trading with the plaintiff. The Court then holds that by reason of the coercive effect of the fines imposed the action of defendants in enforcing this by-law restraining the liberty of contract was not justified by the law of competition and went beyond what was justified in such cases.

The case last cited, then, is authority for the following propositions:

First.—A by-law imposing heavy fines or penalties upon the members of an association who deal with a certain person or with a class including that person is invalid as interfering with his liberty to contract and if loss of trade to any person comes through the enforcement of such invalid by-law he may recover damages from those engaged in its enforcement.

Second.—It is no justification for the enforcement of such a by-law that some of the members of such an association which attempted to enforce it were competitors in business with the injured party. The members could not have been competitors in the transaction in which they were parties or customers.

It will be seen that in the case under consideration the parties defendant went away beyond their legal right of liberty to

contract and sought by enforcing fines or penalties to prevent others from contracting with the plaintiff who possessed like liberty. The difference between such a case and that of three persons voluntarily entering into an association to combine their resources and skill and exercise their right to refuse to contract with whom they please except upon condition and to take advantage of this right so exercised to offer to the trade advantages and inducements by which trade will leave their competitor and come to them, as in the case at bar, is too manifest to need further elucidation.

The case of *Van Horn vs. Van Horn*, 52 N. J. Law, 284; 20 Atlantic Rep.. 485; illustrates a series of acts going entirely beyond what was necessary to exercise the right to engage in competition and intended to ruin the plaintiff's business. The case was rightly decided.

In *Vegelahn vs. Guntner*, 167 Mass., 92; 35 L. R. A., 722; which was a strike case, in the majority opinion it was held that maintaining a patrol in front of or around the plaintiff's premises, with other acts of intimidation, directed to the plantiffs and to persons actually employed or seeking to be employed by the plaintiffs was an unlawful interference with the rights both of employer and of employed. The Court said:

"An employer has a right to engage all persons who are "willing to work for him at such prices as may be mutually "agreed upon and persons employed or seeking employment "have a corresponding right to enter into or remain in the em-"ployment of any person or corporation willing to employ "them. These rights are secured by the constitution itself. "* * * The defendants contend that these acts were justifi-"able because they were only seeking to secure better wages for "themselves by compelling the plaintiff to accept their schedule "of wages. This motive or purpose does not justify *maintain-"ing a patrol in front of plaintiff's premises* as a means of "carrying out their conspiracy. A combination among persons *"merely to regulate their own conduct* is within allowable com-"petition and is lawful, although others may be indirectly af-"fected thereby, but a combination to do *injurious* acts express-"ly directed to another by way of intimidation or constraint, "either of himself or of persons employed or seeking to be em-"ployed by him, is outside of allowable competition and is un-"lawful."

There were two dissents in this case, one by Chief Justice Field and one by Justice Holmes, that of Chief Justice Field principally dissenting from a claim of equity jurisdiction in such case and that of Justice Holmes agreeing with the majority of the Court in the law but disagreeing on the point whether or not the combination to maintain a patrol on the plaintiff's premises for the purpose of meeting and dissuading persons employed or seeking employment by the defendant was an *unlawful* act. Quoting from the last dissenting opinion:

"I agree, whatever may be the law in the case of a single "defendant (*Rice vs. Albee*, 164 Mass., 88), that when a plaint- "iff proves that several persons have combined and conspired "to injure his business and have done acts producing that effect "he shows temporal damage and a cause of action unless the "facts disclosed, or the defendants prove some ground of excuse "or justification; and I take it to be settled and rightly settled *"that doing that damage by combined persuasion is actionable* "as well as doing it by falsehood or by force. * * * The "only debatable ground is the nature of the means by which "such damage may be inflicted. We all agree that it *cannot* "be done by force or threats of force; we all agree, I presume, "that it *may* be done by persuasion to leave a rival's shop and "come to the defendant's; it *may* be done by the refusal or with- "drawal of various pecuniary advantages which apart from "this consequence are within the defendants' lawful control; it "*may* be done by the withdrawal of or threat to withdraw such "advantages from third persons who have a right to deal or not "to deal with the plaintiff, as a means of inducing them not to "deal with him either as customers or servants." Citing cases.

Again:

"The fact that the immediate object of the act by which "the benefit to themselves is to be gained is to injure their an- "tagonist *does not necessarily make it unlawful*, any more than "when a great house lowers the price of certain goods for the "purpose and with the effect of driving a smaller antagonist "from the business."

Plant vs. Woods, 176 Mass., 492; 51 L. R. A., 339; is a late case, apparently considered with great thoroughness and importance because of the peculiar legal relations presented by the facts, covering the combination of strike and boycott. The plaintiff was a labor organization apparently having capacity

to sue and be sued and the defendant a like organization. The defendant organization claimed to be the genuine labor organization and that the plaintiff organization was really composed of non-union men, and defendant declared all painters not affiliated with the defendant to be non-union men and *voted to notify employers of that declaration.* Afterward the defendant organization *voted that all its members working in shops where members of the plaintiff organization were employed should refuse to go to work and sent an agent to the shops where the plaintiff's members were employed, informed the employer there, of the action of the defendant organization* and requested him to induce such members of the plaintiff's organization as were in his employ to sign applications for membership in the defendant organization. No threats of personal violence were made, no express request to discharge the members of the plaintiff organization, but the employer was notified of the action of the defendant organization in voting that its members refused to work in shops where the plaintiff's members were employed and the request aforesaid was made, and in this way the employer was given to understand that his continued employment of the plaintiff's members who did not sign such applications would lead to trouble in his business in the nature of a strike or boycott. The Court said:

"We have therefore a case where the defendants have con-
"spired to compel the members of the plaintiff union to join the
"defendant union and to carry out their purpose have resolved
"upon such coercion and intimidation as naturally may be
"caused by threats of loss or property by strikes and boycotts
"to induce the employer either to get the plaintiffs to ask for
"reinstatement in the defendant union or, that failing, then to
"*discharge them.*"

The foregoing are the conclusions of fact from the situation as the Court understood the situation and to which the Court applied the law. It will be at once seen that this case brought up the question of conflict of legal rights. The plaintiff's members had the right under the law *to contract with and work for whom they choose and at what price they choose without giving any reason therefor, and without being obliged to*

become members of the defendant organization as a condition of their exercise of their constitutional right to make contracts for their labor. At the same time the defendant organization and its members *had the right in the law to withdraw singly or in a body from the service of the employers in question for any reason which seemed to them sufficient.* They had no right, however, apart from their right to contract or refuse to contract, to coerce or persuade employers not to employ the plaintiff's members. If loss come to one from the exercise of a legal right by another it is *damnum absque injuria*, but if that other goes beyond the exercise of his legal right and does some act not essential to the exercise of that legal right and does this latter act with the intent to cause loss and the act does cause loss, the case is quite different. This is readily illustrated by considering the case for a moment as if the defendants had nothing whatever to do with the work at which the plaintiff's members were engaged, were not painter workmen at all, and approached the employers of the plaintiff's members with the purpose of endeavoring to persuade or coerce such employers from giving work or employment to the plaintiffs. In such a case it will be at once answered that they were invading the legal rights of the plaintiffs and committing an unlawful act. What difference did it make t. * the defendant's members were engaged in the same line of work and in the service of the same employers with the plaintiff's members? The defendant's members had a right to refuse to contract with or work for said employers without giving any reason for such action. They could do this singly or all together. But they were not content with this. They went further and committed the illegal act of coercing or persuading these employers to discharge the plaintiff's members. This illegal act was superadded to the act of refusing to work for such employers which they had legal right to do. This illegal act *was not necessary to the exercise or enjoyment of the legal right on the part of the defendant's members to refuse to contract with or work for any person, with or without a reason. In visiting the employers and presenting conditions they went beyond what was necessary for*

the exercise of their own right of freedom to contract and invaded the right of the plaintiff's members. The Court decides this, not in these words but in substance, although the Court seems to go further than is necessary for the decision of the case. We quote:

"Everyone has a right to enjoy the fruits and advantages "of his own enterprise, industry, skill and credit. He has no "right to be protected against competition, but he has a right "to be free from malicious and wanton interference, disturb- "ance or annoyance. *If disturbance or loss comes as a result "of competition or the exercise of like rights by others, it is "damnum absque injuria unless some superior right by con- "tract* or otherwise is interfered with. * * * The defend- "ants contend that they have done nothing unlawful and in "support of that contention they say that a person may work "for whom he pleases and in the absence of any contract to the "contrary may cease to work when he pleases and for any rea- "son whatever, whether the same be good or bad; that he may "give notice of his intention in advance, with or without stating "the reason; that what one may do several men acting in "concert may do and may agree beforehand what they will do "and may give notice of the agreement and that all this may "be lawfully done notwithstanding such concerted action may, "by reason of the consequent interruption of the work, result "in great loss to the employer and his other employees and that "such a result was intended. In a general sense and without "reference to exceptions arising out of conflicting public and "private interests all this may be true. It is also said that "where one has the lawful right to do a thing the motive by "which he is actuated is immaterial. * * * But in many "cases the lawfulness of an act which causes damage to another "may depend upon whether the act is for justifiable cause and "this justification may be found sometimes in the circum- "stances under which it is done, irrespective of the motive, "sometimes in the motive alone and sometimes in the motive "and circumstances combined."

The Court then cites several cases of trade competition relative to malice in the doing of an act otherwise legal; but sums up by taking the case out of the rule of competition in these words:

"The necessity that the plaintiffs should join this associa- "tion is not so great nor *is its relation to the rights of the de-*

"*fendant as compared with the right of the plaintiffs to be free* "*from molestation* such as to bring the acts of the defendants "under the shelter of the principles of trade competition. Such "acts are without justification and are therefore malicious and "unlawful and the conspiracy thus to force the plaintiffs was "unlawful."

It is not easy to ascertain from this opinion on what ground the decision is placed. Before coming to the question of malice or discussing the law of competition the Court uses these words:

"In this as in every other case of equal rights the right of "each individual is to be exercised with due regard to the sim- "ilar right of all others and the right of one may be said to "end where that of another begins."

This would seem to refer to the maxim "*sic utere tuo ut alienum non laedas*" and to apply that rule to the exercise of the right to contract, because both parties in this case were claiming the right to contract. Further on in the opinion the decision seems to be put on the ground that the motives of the defendant association were malicious; but it surely could not have been the intention of the Court to decide that the acts charged against the defendants were illegal because malicious and consequently malicious because they were illegal. It is said that unless there was a justifiable cause the acts were malicious and unlawful. But which acts? Of course, it is elementary that the law infers malice from the wilful commission of an unlawful act; and if by this is meant that the act of preventing the plaintiffs from obtaining employment was unlawful and consequently malicious the proposition that it was malicious would necessarily flow from the decision that it was unlawful. But if it is meant that the act in question would have been lawful had it been found as a matter of fact that the defendants performed in good faith, thinking it to be for their best interests, then the opinion is unintelligible. So that we are not to suppose the last proposition was intended to be decided and that proposition is inconsistent with the conclusion that the requirement that the plaintiffs should join this association was not such in its relation to the rights of the de-

fendants as compared with the rights of the plaintiffs as to bring the acts under the shelter of the principles of trade competition. It seems to us that this case decides that the act of persuading or inducing an employer not to employ or not to continue in his employment certain persons is an unlawful act in a case where the person so persuading the employer is not himself an applicant for the same position from which he seeks to have the other discharged. In other words, in the case of *Plant vs. Woods*, the defendants were not in the exercise of a legal right of their own in causing injury to the plaintiffs. They went beyond what was necessary for an exercise of their legal right and invaded the legal right of liberty to contract of plaintiffs.

This brings up the question, How shall we ascertain when competitors have gone beyond their legal rights in such matters? Surely not from the criterion that their acts have caused or may cause loss to another party. Perhaps the answer to this question will have to be worked out slowly by the Courts from a great number of decisions as many other questions have been in particular cases, but it seems to us that the law has progressed far enough on this point so that we may say that in every case where the deefndants have done nothing more than that which some affirmative rule of constitutional law authorized them to do they cannot be held answerable in damages or in fine for so doing without denying and destroying this constitutional right, no matter with what motive they have exercised that right. The dissenting opinion in *Plant vs. Wood*, as well as the opinion of the majority of the Court, seems to also go upon the ground that the act of the defendants or any act *which interferes with the exercise of a right on the part of the plaintiff* is illegal unless justified and that justification must be found in the law. The dissenting opinion of Mr. Justice Holmes says that:

"Justification may depend upon the object of their con-"duct, that is, upon the motive with which they acted."

We understand that that language is to be limited to the case before the Court and does not refer *to any justification of*

the acts of the defendant in quitting work or refusing to work either singly or in a body, because that act was their constitutional right and required no justification; but it refers to the act of the defendant in persuading the employer to discharge the plaintiff's working men and in *threatening* to exercise or refrain from exercising a certain legal right, viz: the right to suspend contract relations unless the employer would so discharge the plaintiff's members. This interesting case is further cited under the subdivision of this brief relating to the sufficiency of the plea of the defendant Aikens.

In *Perkins vs. Pendleton*, 90 Me., 166; 38 Atlantic Rep., 96, the question of whether or not it is an unlawful act or tort to procure the discharge of a workman by threatening, persuading and inducing his employer to discharge him because he would not join a certain labor union came up on demurrer and unincumbered with other questions and the Court held that this was a wrong or tort and reviewed several cases, but does not agree with our position in this brief that it is a wrong or tort for any person not in the exercise of *a legal right the exercise of which requires him to do such a thing* to persuade an employer to discharge his servant. It declines to go so far. The Supreme Court of Maine, however, draws this distinction in the following words in this class of cases:

"The case of *Heywood vs. Tillson*, 75 Me., 225, in no way "conflicts with this result. There the Court simply decided "that the defendant was not liable for doing what *he had a per-"fect and absolute right to do, even if in doing this he was act-"uated by a malicious motive against the plaintiff.* Many cases "were cited to the effect that malicious motives make a bad act "worse, but they cannot make that wrong which in its own es-"sence is lawful."

In the case of *Hopkins vs. Oxley Stave Company*, decided in the Circuit Court of Appeals for the Eighth circuit, reported in 83 Fed. Rep., 912, it was recognized as a wrong and tort to combine to wrongfully interfere with the plaintiff's freedom of action in the management of his own affairs and business; and in this view, compelling a man to join a labor organization against his will must be in itself a tort. The Court says that if

it concedes that the reasoning employed in *Bohn Mfg. Co. vs. Hollis,* 54 Minn., 223; 55 N. W. Rep., 1119, was sound as applied to the facts in the case, "yet it by no means follows" (and that fact was recognized in the decision) that the members of the association would have had the power to combine for the purpose of compelling other persons *not members of the association to withhold their patronage* from a wholesale dealer who failed to conduct his business in the mode prescribed by the association.

In *Knudsen vs. Benn,* 123 Fed. Rep., 636, the Court said in reference to one of this class of cases:

"Fellow workmen may agree together to leave at once the "service of their employer, but having done so and being no "longer interested in that matter, then, notwithstanding cer- "tain dicta in cases that have been read from, it does not seem "clear to me that they are acting lawfully when they are per- "suading the servants of their former employer to break their "contracts and leave the service. It is a matter that does not "concern them any longer. It is a matter that is apparently "injurious to their former employer. It seems to me that such "an interference in a matter with which they have no rightful "concern and which is injurious to another is not lawful."

In *Underhill vs. Murphy,* (Ky.); 78 S. W. Rep., 482, procuring or coercing persons not to deal with the plaintiff by force or intimidation was further considered an injury *to the good will of plaintiff's business.* This gave a basis of chancery jurisdiction.

The case of *Barr vs. The Essex Trades Council, et al.,* 53 N. J. Equity, 101; 30 Atlantic Rep., 881, is an extraordinary and a leading case. It is extraordinary in the extent of the combination against the plaintiff and in the methods employed. It was a boycott case within the definition of boycott hereinbefore quoted. The defendant was the publisher of a newspaper. His employees were members of the local typographical union and he entered upon the policy of purchasing in New York stereotype plate matter for use in his paper. This stereotype plate contained news and matter edited and set up in New York and suited to the general needs of newspapers. The defendants were eighteen organizations or labor unions embracing different

trades and employments, many or most of them having nothing to do with the business of typesetting, and these eighteen bodies were represented by selected members or delegates in a society or representative body known as the Essex Trades Council. This latter body collected statistics from each member of the eighteen labor unions by requiring such member to fill out a blank slip furnished for that purpose, stating the amount expended by him in purchases during a given period, the character of the articles bought *and the names of the tradesmen with whom he has dealt.* These cards were filled up and returned by the members to their own union and by that union reported to the Essex Trades Council. The Essex Trades Council having this knowledge so acquired and controlling the various unions undertook to publish names and addresses of tradesmen and persons in business, including professional men, whom it deemed worthy of patronage. Thus armed the Essex Trades Council declared a boycott against the plaintiff. Plaintiff's patrons were advertisers and purchasers of and subscribers to his newspaper. The Trades Council brought to the notice of the customers of the plaintiff their boycott of the plaintiff and issued circulars advertising it and intimated that the patronage of *all these various trades unions and the members thereof would be withdrawn* from those who patronized the plaintiff. Under our view of the law, this was beyond question an actionable conspiracy. The defendants are not exercising a right to contract or refuse to contract at all. The Court on the question of motive said: (Rep., p. 884.)

"The defendants claim, and they are entitled to be credited "with being sincere in the contention, that they believed in all "matters complained of they acted strictly within the lines of "their legal rights. This position justifies us in assuming that "if they had not believed so and had not been satisfied they "were correct in law and acts challenged would not have been "committed and if now convinced they are wrong will not again "be attempted."

The Court then inquires whether the defendants were privileged to inflict this injury on the complainant, traces the right

of the complainant to carry on his business in his own way, which assertion carries with it a negation of any right on the part of others to interfere with carrying on his business, reviews many of the authorities and takes up the question of malice. It says: (p. 886.)

"Malicious injury to the business of another has long been "held to give a right of action to the injured party."

Citing many well known cases and quoting from *Van Horn vs. Van Horn*, 56 N. J. Law, 318; 28 Atlantic Rep., 669, as follows: (p. 886.)

" 'The Courts look through the instrumentality or means " 'used to the wrong perpetrated with the malicious intent and " 'base the right of action upon *that*.' The right of action de- "pends, then, not so much upon the nature of the act done as "upon *the intent with which it is done*, always assuming that "*injury* has attended the doing of it."

He quotes (at p. 886) from the opinion of Judge Taft in *Toledo, etc., Ry. Co. vs. Pa. Ry. Co.*, 54 Fed. Rep., 730, as follows:

" 'It is generally lawful for the combiners to withdraw their " 'intercourse and its benefits from any person and to announce " 'their intention of doing so, and it is equally lawful for the " 'others of their own motion to do that which the combiners " 'seek to compel them to do. Such combinations are said to be " 'unlawful conspiracies, though the acts themselves when con- " 'sidered singly are innocent, when the acts are done with " 'malice, i. e., with the intention to injure another without law- " 'ful excuse.' "

He also (at p. 887) quotes from *Steamship Company vs. McGregor* (one of the opinions) as follows:

" 'Now intentionally to do that which is calculated in the " 'ordinary course of events to damage, and which does in fact " 'damage, another in that other person's property or trade, is " 'actionable *if done without just cause or excuse*. Such inten- " 'tional action when done without just cause or excuse is what " 'the law calls a malicious wrong.' See also *Temperton vs. "Russell* (1 Q. B., 715). This renders necessary an inquiry as "to the intent of the defendants to ascertain *if the case falls*

"within the class in which it is held that a malicious motive is "the defendant may make an act which would not be wrongful "without the malice, a wrongful act when done with malice. "Steamship Co. vs. McGregor, 23 Q. B. Div., 598, 608. From "the authorities the test is, Has the injury been inflicted inten- "tionally and without legal excuse? When we speak in this "connection of an act done with malicious motive it does not "necessarily imply that the defendants were actuated in their "proceedings by spite or malice against the complainant, Mr. "Barr, in the sense that their motive was to injure him per- "sonally, but that they desired to injure him in his business in "order to force him not to do what he had a perfect right to do. "In this case the defendants have, I doubt not, no personal "spite against Mr. Barr and no desire to do him a personal in- "jury. Nor do I suppose they wish to permanently injure his "enterprise, for they undoubtedly want re-employment for "those who left him. They only wish by crippling his business "to compel him to accede to their views as to the material he "shall use in the make up of his paper."

The opinion then, after having found the act committed, the intention with which that act was committed, that malice was a necessary ingredient of the act, if wrongful, and that there was no malice in the act in question, proceeds: (p. 859.)

"A legal excuse for the action of the defendants is next "sought in the claim that the Essex Trades Council is a busi- "ness institution and that what it has done has been done in "the prosecution of such business, seeking, I suppose, to bring "the acts within the rule of *Steamship Co. vs. McGregor,* 15 Q. "B. Div., 476; 23 Q. B. Div., 598. That case proceeded upon the "doctrine of a lawful competition in business, both parties be- "ing engaged in carrying on the same character of business "and the acts complained of having been adopted for the ad- "vancement of the defendant's own trade."

The court then says that the members of the various trades unions are not carrying on competition in advertising for hire or in publishing newspapers with Mr. Barr. It is quite difficult to see any safe legal ground upon which this decision has been put by the court, but it is not difficult to find legal ground for the decision on the facts set forth. The defendants were in the exercise of no legal right in interfering with the plaintiff's patronage. They committed the wrong or tort which is com-

mitted in all cases of boycott or ostracism or even in cases of libel by words not actionable in themselves, but tending to hold the plaintiff up to contempt or ridicule and so lessen his esteem in the community in which he lives and consequently his liberty to engage in trade and carry on his business. Why it should be doubted that this is a tort and a wrong in cases where a shoemaker takes up the quarrel of a typesetter or in cases where a typesetter not striving to obtain a contract with the advertiser himself, tries to induce the advertiser not to contract with the newspaper publisher in order that the newspaper publisher may be coerced to forego some legal right of his, we cannot state. But the case is cited for this proposition, which is contained in it by the decision there given, notwithstanding it is considerably covered up by words, viz:

"No matter how kind or benevolent the intention of the sev-
"eral members of a combination formed for the purpose of driv-
"ing off plaintiff's customers by threats or persuasion may be,
"their act in so doing is unlawful and hence malicious within
"the legal meaning of the latter term."

Another leading case is *Park & Sons Company vs. National Druggists' Association*, 175 N. Y., 1; 67 N. E. Rep., 136; 62 L. R. A., 632; which should be put alongside of the case last hereinbefore stated. The case we are now considering seems to have been thoroughly briefed and presented and well considered by the Court. The questions decided arose on demurrer and the decision is not so rambling as in the preceding case, but there were questions of trade marks, copyrights and patents which might to some extent have affected the decision. The members of the Court filed different and dissenting opinions, but there seems to be general concurrence, either expressly or by implication, in all the opinions in the proposition that for the purpose of obtaining either customers or terms for themselves two or more competitors may combine against another competitor without reference to their intention in so doing. Speaking of the word "malice" as used in such cases the dissenting opinion of Martin, J., who was inclined to think the conspiracy was unlawful, quotes from *Doremus vs. Hennessey*, 176 Ill., 608:

"Losses wilfully caused by another from motives of malice "to one who seeks to exercise and enjoy the fruits and ad- "vantages of his own enterprise, industry, skill and credit, will "sustain an action. * * * Malice as here used does not "merely mean an intent to harm, but means an intent to do a "*wrongful* harm and *injury*. An *intent* to do a *wrongful* harm "and *injury* is unlawful and if a *wrongful* act is done to the "detriment of a right of another it is *malicious* and the act "*maliciously* done with the intent and purpose of injuring an- "other is not lawful competition."

The above is not quoted as a precedent for clearness of expression, but we think there can be gathered from it what the Judge intended to say.

In *Delz vs. Winfree*, 80 Tex. Sup. Ct., 400; 16 S. W. Rep., 111, both sides of this question are presented in the decision; that is, what will constitute an actionable conspiracy and what exercise of right on the part of the confederate will render the combination not criminal. This case also shows an important qualification of the right of competition present in all cases of boycott. The Court said:

"A person has an absolute right to refuse to have business "relations with any person whomsoever, whether the refusal is "based upon reason or is the result of whim, caprice, prejudice "or malice, and there is no law which forces a man to part with "his title to his property. *The privilege here asserted must be "limited, however, to the individual action of the party who as- "serts the right.* It is not equally true that one person may "from such motives *influence another person to do the same "thing.*"

This sets forth our position and what we claim the law to be on this question, always keeping in mind that contract and competition cover rights to the exercise of which the co-operation of two or more is necessary. This case was tried on its merits afterward and is again reported, 6 Tex. Civil App., 11; 25 S. W. Rep., 50. See also *Walker vs. Cronin*, 107 Mass., 555.

In *Beck vs. Railway Teamsters' Protective Union*, 118 Mich., 497; 77 N. W. Rep., 13; the word "boycott" is defined and a combination of acts there described found to be an unlawful conspiracy and several cases are reviewed. The defendants in that case undertook by threats, distribution of circulars

and pickets to prevent other workmen having contract relations with the plaintiff. The Court said very aptly:

"This is not a question of competition, but rather an at-"tempt to stifle competition."

National P. Assn. vs. Cummings, 170 N. Y., 315; 58 L. R. A., 135, is a noteworthy case in which it is said in the majority opinion that one or more men may refuse to work for another for any reason deemed by them sufficient. The dissenting opinion concedes this but takes the ground that this right of refusal must not be exercised for the purpose of interfering with the liberty to contract of another person.

Many other cases of strikes and boycotts could be cited, but we have selected in the foregoing chapter representative cases of this kind, particularly trying to present cases where there were no threats or rioting or other form of unlawful intimidation used. We think it will be apparent from a review of these cases that the act of a striker in prohibiting or preventing by any means another workman from taking employment, even by persuading the employer not to take him, the striker himself not offering his services instead, and *a fortiori* every case of boycott involves an unlawful act. It is unlawful because it is an invasion of a legal right which the other party possesses, viz: the right of freedom of contract, to contract with whom he pleases and upon what terms he pleases. In invading this right the striker or the boycotter *is not engaged in the exercise of any similar right in his own behalf.* His motive may in some such cases be inquired into. But when the act is not merely indifferent, but illegal, the question of motive becomes immaterial because the act itself is illegal. This has been, as the quotations heretofore show, repeated in many cases, yet in some cases the Courts have in addition attempted to cover questions not necessarily in those cases. In many of those strike and boycott cases the Court was asked to issue an injunction restraining strikers or boycotters from carrying on their strike or boycott. Because of existing precedents to the effect that a libelous publication would not be enjoined, these Courts in such injunction cases have sought to distinguish between the

wrong committed by a libelous publication which merely holds a party up to contempt and ridicule or lessens him in the esteem of the public and the wrong that is done by a boycott or by persuading other persons not to have trade or contract relations with the aggrieved party. This we submit was a mistake on the part of those Courts and we contend that the right violated by a combination of persons formed for the purpose of persuading the public or any considerable portion thereof not to deal with or patronize a person, violates the same legal right of such person as is violated by a libelous publication of the kind aforesaid. If one publish of another that he is an "itchy old toad" (*Villers vs. Monsley*, 2 Wils., 403), or a "frozen snake" (*Hoare vs. Silverlock*, 12 Q. B., 624), or "a man of straw" (*Eaton vs. Johns*, 1 Dowl. N. S., 602), or a "hypocrite" (*Thorley vs. Lord Kerry*, 4 Taunt., 355), or "an enormous swine" (*Solverson vs. Peterson*, 64 Wis., 198), or a "liar" (*Hake vs. Brames*, 95 Ind., 161), or an "ingrate" (*Cox vs. Lee*, L. R. 4 Ex., 284), or of a physician that he is ignorant in his calling (*Gauvreau vs. Superior Publishing Company*, 62 Wis., 403), the publisher is held liable for a tort because he is engaged in inflicting by indirection the same wrong that is directly inflicted by a large combination of persons who directly solicit the public or all that part of it which they can reach to refuse or discontinue trade relations with the plaintiff. The wrong here also is depriving the libeled person of business intercourse, which consists of making contracts, and also social intercourse with his fellow men. In the boycott and strike cases above referred to the boycotter and striker merely act more directly to the same result and commit the same wrong upon the person to be coerced and the same damage, by direct appeal to the community or to a large portion of it, not to deal with the person to be coerced instead of employing the fiction of the "enormous swine" or the "frozen snake." We submit that the boycott and the strike cases properly understood have no bearing upon the questions under discussion in the case at bar, because in the strike cases the strike is legal and upheld by the authorities so long as it is only carried to the extent of re-

fusing to work or quitting work singly or all together, *no matter what may be the motive for so doing,* and the boycott is always illegal.

In the chapter of this brief entitled "Malice" we consider and cite the authorities which affirm the proposition that the motive attending the exercise of an otherwise lawful—that is, not unlawful—act or the purpose with which such act is exercised, cannot change the legal quality of the act and make that a wrong which but for such motive or purpose would not have been a wrong. This view evidently regards all human acts as either legal or illegal and does not admit of a class of indifferent acts which might be legal or illegal according to the motive of their exercise and the resulting loss. While in the foregoing class of cases are found the decisions which, with the cases cited in these decisions, go to limit the older and greater number of decisions by asserting, for the most part in very ambiguous terms, that an act otherwise lawful may become actionable if it be done with a malicious motive and cause, as some say, "damage," to another, as other cases say, "injury." But that conflict does not enter into the questions before the Court in this case at bar, because both lines of decision recognize in every case, we think, either expressly or by necessary implication, that *where the legal right in question consists in the exercise of the acts charged as wrongs, or what is the same thing when the alleged wrongs are such acts as are necessary to the exercise of the particular legal right conceded abstractly, but sought to be denied because of malice,* the motive or purpose with which the right exercised is immaterial. But when the acts charged as wrongs are, when regarded apart from malicious intention or purpose, merely indifferent, that is to say, not illegal, and although done under a claim of a legal right, are not so necessary or essential to the exercise of that right that to forbid the act would be to deny the right, to restrain or hamper the act would be to restrain or hamper the right, and where the legal right cannot be said to consist in the exercise of the acts challenged, there are, no doubt, in the large class of cases above referred

to, both decisions and dicta that if from such indifferent acts done with malevolent purpose damage flow such acts become actionable wrongs. But without taking sides in this controversy, we maintain that in the case at bar there could be no actionable wrong under either class of cases. Because the acts charged of co-operation and refusal to contract, except on condition, are essential to the exercise of the right to make contracts as well as essential to the right to enter into trade and engage in competition, and to clog those acts with conditions is to clog the right contended for with conditions. This very constitutional right involves in its exercise the doing of the same acts which are here charged to have been malevolently done. In any such case to punish one for doing such act on the ground that he did it from malicious motives would be to strike down at once the whole theory of liberty to contract. Because a man cannot be said to be at liberty to do that which he is subject to arrest and judicial inquiry for doing. So much on the bare proposition of liberty to contract. When we come to the consideration of trade competition nothing could be truer and more appropriate than the remarks of the Judge in *Chambers vs. Baldwin*, 91 Ky., 122:

"Competition frequently engenders not only a spirit of riv-
"alry, but enmity; and if the motive influencing every business
"transaction that may result in injury or inconvenience to a
"business rival was made the test of its legality, litigation and
"strife would be vexatiously and unnecessarily increased and
"the sale and purchase of commodities very much hindered."

VI.

MALICE.

In an article found in the Reports of the American Bar Association, Vol. 21, for 1898, discussing the question of "Malice In Civil Actions," the author quotes Lord Macnaghten as saying, "Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself," and cites other legal authority to the effect that this "unfortunate word," this "per-

plexing word," has occasioned much confusion in the law. For the purpose of avoiding some of this confusion we will use the word "malice" in this chapter to indicate malice in law, or that malice which the law infers from "a wrongful (unlawful) act done intentionally without just cause or excuse." *State ex rel. Durner vs. Huegin*, 110 Wisconsin, pp. 249, 250. We will indicate the other condition, sometimes called malice in fact, by the words, "malevolent intent." There is certainly an overwhelming array of legal authority, not resting on *obiter dicta*, but on actual adjudications, to sustain the proposition that no one can be held answerable in law for the exercise of a legal right on the ground that he exercised such right with malevolent intent. *Docter et al. vs. Riedel et al.*, 96 Wis., 158, where the demurrer admitted the conspiracy for the purpose and the malevolent intent in entering up judgment on *cognovit* without notice or previous demand of payment and issuing execution thereon and levying on plaintiffs' goods, is a good illustrative case. *Raycroft vs. Tayntor*, 68 Vt., 219; 33 L. R. A., 225; was a case tried on its merits, but in which at the close of the testimony the defendant moved the court to direct a verdict in his favor, thus bringing up the question fairly for decision. The facts showed that with great anger and apparent malevolent intent the defendant, the proprietor of a granite quarry, ordered his superintendent in charge of the quarry to discharge the plaintiff and to refuse to permit the plaintiff to continue work. The Court (adopting a quotation employed) said:

"If the defendant's act be (1) legal in itself and (2) vio-
"lates no superior right in another, it is not actionable, al-
"though it be done maliciously and cause damage to that
"other."

The language above quoted is very concise and accurate compared with that found in opinions doubting, but not deciding (for we have found none deciding), the negative of the foregoing proposition. The only doubt can arise upon the description of the act as, "one legal in itself," but it is easier to criti-

cise this expression than to improve on it and we submit that the fair meaning of this expression is an act which without reference to the question of damage to another is authorized by law. This Court thought its decision supported by the following:

Walker vs. Cronin, 107 Mass., 555.
Frazier vs. Brown, 12 Ohio St., 294.
Chatfield vs. Wilson, 28 Vt., 49.
Mahan vs. Brown, 13 Wendell, 261.
Chipley vs. Atkinson, 23 Fla., 206.
South Royalton Bank vs. Suffold Bank, 27 Vt., 505.
Harwood vs. Benton, 32 Vt., 724.

We will not attempt to review all these cases, but merely refer to some of them particularly illustrative and forming the basis of other decisions. The case of *Phelps vs. Nowlen*, 72 N. Y., 39, reported with extensive notes in 28 American Reports, 93, is also a decision in direct affirmance of the proposition that in the exercise of a legal right the motives with which it is exercised are not relevant to the inquiry whether or not one is chargeable with damages caused by its exercise. The act done in *Phelps vs. Nowlen, supra*, consisted in digging on his own land a ditch through an artificial embankment around a spring and the damage caused was the lowering of the water in plaintiff's well which had apparently some subterranean connection with the spring.

See also the numerous cases cited in the notes of this case in 28 Am. Rep., 101, and numerous cases cited and collected in the article entitled, "Malice as an Ingredient of Civil Cause of Action," by L. C. Krauthoff, in Vol. 21, Reports of American Bar Association, pages 335 to 390.

In *South Royalton Bank vs. Suffolk Bank, supra*, the question was decided on demurrer which admitted malevolent intent, combination and co-operation for the purpose of injuring, breaking down and destroying the plaintiff, a banking corporation, in its business by buying up and holding large amounts of plaintiff's notes, then refusing to receive for them in exchange other circulating notes and currency and accumulating the same and presenting them to the plaintiff and requiring the

plaintiff to pay coin in redemption therefor as fast as defendant could buy up such quantities. It was held that no action could be maintained, notwithstanding these acts were done from malevolent motives, because the defendants were only doing those acts which they had a legal right to do.

In *Auburn, etc., Plank Road Company vs. Douglass*, 9 N. Y., 444, 450, this question was decided upon demurrer to an answer carried back to the complaint so that the point was expressly adjudicated upon the following facts: A farmer owning land adjacent to a toll gate on a turn pike road took down his road fences and graded a track on his own land connecting at both ends with the plaintiff's road and extending on both sides of plaintiff's gate and allowed persons traveling the turn pike to use his land with the road so made to avoid the toll gate. It was held there was no liability. An interesting indication of our progress towards socialism (8 Harvard Law Review, 511-532) in fifty years may be found by comparing this opinion of Selden, J., in which he alleges the following reason as conclusive against recovery, with the opinion of the Wisconsin Supreme Court:

"If malignant motive is sufficient to make a man's dealings "with his own property actionable when accompanied by dam- "age to another, where is this principle to stop? It will apply "to a thousand other cases with the same force as to this. If a "man sets up a trade not with a view to his own profit, but "solely to injure one already established in the same trade, how "can the case be distinguished in principle from this?"

The case of *Glencoe, etc., Co. vs. Hudson, etc., Co.*, 138 Mo., 439; 40 S. W. Rep., 93, is also a good illustrative case decided upon demurrer. Although the pleading demurred to contained no averment of malevolent intent, it did aver an existing contract with a railroad company by plaintiff for removing and hauling gravel and sand and that the defendant induced the railroad company to break its contract with plaintiff by notifying the railroad company that defendant was the owner of the land from which the sand and gravel were being taken and would hold said railroad company liable in trespass if it moved

any more. Without at all opening the controversy between *Lumley vs. Gye*, 2 El. & Bl., 216, and cases following that case and *Chambers & Marshall vs. Baldwin*, 91 Ky., 122; 15 S. W. Rep., 57; and cases there cited, a conflict which is immaterial to the questions here under discussion, it will be observed that in *Glencoe, etc., Co. vs. Hudson, etc., Co., supra*, the defendant did nothing more than was necessary to the exercise of its right to hold and enjoy property and protect its own property in giving the notice and it was held there was no liability.

On the other hand, *Boyson vs. Thorne*, 98 Cal., 578; 33 Pac. Rep., 492; also decided on demurrer, perhaps goes too far, because the pleading demurred to did not show that the defendant was in the exercise of any legal right in persuading Newlands to discontinue contract relations with the plaintiff, unless, there is in California a legal right for every citizen to meddle with the business or contracts of other citizens and to advise gratuitously.

But see *Baker vs. Sun Ins. Co.*, 64 S. W. Rep., (Ky.) 967.

Chambers vs. Baldwin, 91 Ky., 122; 15 S. W. Rep., 57; was also decided on demurrer and the facts assumed to establish that the defendant with malevolent intent and with the desire to benefit himself induced a third person to break his contract with plaintiff, thus causing damage. Here the facts are so meagerly set forth in the petition that it is not possible to say whether the defendant went farther than was necessary to the exercise of his legal rights. If he merely "induced Wise to break a contract with the plaintiff by himself purchasing Wise's crop, we should say the rule was correctly applied and the plaintiff not having specifically set forth the acts by which Wise was induced to break his contract the decision on demurrer was right, and the concluding part of the opinion justifies the act apparently on the ground of trade competition. In *Boulier vs. Macauley*, 91 Ky., 135; 15 S. W. Rep., 60; decided at the same time with the last foregoing case, the same rule was applied to a contract with the dramatic performer, Mary Anderson, where there was evidently suggested to the Court a

distinction on the ground that the agreement broken was one for personal services. The Court said:

"It is not the policy of the law to restrict or discourage com-"petition in any business or occupation, whether concerning "property or personal services, there being no good reason for "making more stringent regulations in respect to the latter, "except where some one of the domestic relations exist, than "the former; for if in order to leave sale and exchange of prop-"erty free and unrestrained a person may lawfully *and without "legal inquisition of his motive* buy what another offers for sale "and has right to sell, it is no less just and expedient that in or-"der to have a fair remuneration for labor a person shall be al-"lowed to hire the service of anyone *sui juris* who offers to be "hired."

Many other cases might be referred to, such as:

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.
Adler vs. Fenton, 24 How., 407.
Kiff vs. Youmans, 86 N. Y., 324.
Allen vs. Flood, (1898 App. Cas., 1).
O'Callaghan vs. Cronan, 121 Mass., 114.
Mogul Steamship Co. vs. Macgregor, 21 Q. B. D., 544; 1892 App. Cas., 25.
Continental Ins. Co. vs. Underwriters, 67 Fed. Rep., 310.
Huttley vs. Simmons, 1898 1 Q. B., 181.
Ajello vs. Worsley, 1898, 1 Ch., 274.

And see article in 18 Central Law Journal, 424-428, which collects a great number of cases.

In *Kelly vs. The Railway* Co., 93 Iowa, 436; 61 N. W. Rep., 957, the questions decided arose on demurrer to plaintiff's pleadings, one branch or part of which raised the question whether it was an actionable conspiracy on the part of a railroad company as against the proprietor of one of its restaurants or eating houses to induce another to start a restaurant a short distance from him and to refuse to stop its trains so as to permit travelers to patronize the plaintiff's restaurant and by other acts to discriminate against the plaintiff. The Court said: (p. 452.)

"We see nothing in the petition which charges an action-"able conspiracy. Defendant had a right to run its trains as it "saw fit and also had the right to supply meals to its passen-

"gers at any place it desired. The lease made between plaintiff "and defendant did not obligate defendant to stop its trains "for meals at his house. In doing what is charged against it "defendant was neither doing an unlawful act nor a lawful act "in an unlawful manner. The motive with which one does an "act furnishes no cause of action unless there be some legal "wrong, and not then if it relate to a breach of contract."

In *Spalding vs. Vilas*, 161 U. S., 483; 6 Supreme Court Reports, 631; the Postmaster General of the United States was sued on account of official communications made by him pursuant to an Act of Congress and in regard to matters within his authority, on the claim that the communications were prompted by personal and malicious motives against the plaintiff. This Court denied the relief, saying (p. 499): "If we were to hold that the demurrer admitted for the purposes of the trial that the defendant acted maliciously, that could not change the law."

Turning to the other side of this proposition we have the cases cited in the second subdivision of this brief on Strikes and Boycotts, and also the case of *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, 44 C. C. A., 426; 62 L. R. A., 673; and cases cited in notes. This last case makes the distinction which we desire here to urge upon this Court. Because in that case the Court recognized the doctrine that certain acts become wrongs when performed with malevolent purpose which acts would not otherwise constitute legal wrongs, while other acts do not become legal wrongs no matter what malevolent purpose accompanies their exercise. The Court said:

"We are thus confronted with the inquiry whether the mo-"tive which influenced the defendant company to offer for sale "such calicoes of the plaintiff's manufacture as they had in "stock at the price named in its circular, conceding such mo-"tive to have been as alleged in the complaint, changed the com-"plexion of the act and rendered the same unlawful when but "for the motive of the actor it would have been clearly lawful. "It is common learning that a bad motive—such as an intent "to hinder, delay and defraud creditors, by virtue of statute 13, "Eliz. Chap. 5 and possibly by the rules of the common law—"will render a conveyance or transfer of property void which "but for the bad motive would have been valid. So also one who

"sets the machinery of the law in motion without probable cause "and for the sole purpose of injuring the reputation of another "or subjecting him to loss and expense is guilty of an unlawful "act which would have been lawful but for the improper mo- "tive. And one who by virtue of his situation has a qualified "privilege to make defamatory statements concerning another "may be deprived of the benefit of that privilege by proof that it "was not exercised in good faith, but in pursuance of a malic- "ious intent to injure the person concerning whom the defama- "tory statement or statements were made. Pollock Torts, "Webb's Edition, pp. 331-335, and cases there cited. There is "also some authority for saying that one who maliciously (that "is, with intent to obtain some personal benefit at another's loss "or expense) induces another to break his contract with a third "party, thereby commits an actionable wrong if special damage "is disclosed although the act done would have been lawful if "the wrongful motive had been absent. * * * The case at "bar falls within neither of the exceptions to the general rule "above stated—that if an act is done in the exercise of an un- "doubted right and is lawful the motive of the actor is imma- "terial. No one can dispute the right of the defendant com- "pany to offer for sale goods that it owned and were in its pos- "session, whether the quantity was great or small, for such "price as it deemed proper. This was the outward, visible act "of which complaint is made, and being lawful the law will not "hold it to be otherwise because of the secret purpose enter- "tained by the defendant company to inflict loss on the plain- "tiff by compelling it to reduce the cost of a certain kind of its "prints or calicoes."

By the words above quoted, "done in the exercise of an undoubted right," we think is meant that the right must be one which is not merely enjoyed or possessed negatively, but which consists in acting in the particular way in which the defendant is charged with acting in the suit in question. On this point we can refer to *Continental Ins. Co. vs. Board of Underwriters, supra*, where there were two classes of acts complained of. One was regulation of premium rates and non-intercourse with the insurance companies not members, which were held lawful because they did not transcend the bounds of trade competition. The other class of acts consisted of publishing false statements, soliciting owners to cancel policies of the companies represented outside the board and threatening to boycott agents and

customers of such outside companies and were held to be illegal.

This is also what is meant in *Quin vs. Leathem*, 1901 App. Cas., 495, where it is said (p. 536):

"The defendants were doing a great deal more than exercising their own rights. * * * Were violating their duty to "the plaintiff and his customers and servants which was to "leave them in the undisturbed enjoyment of their liberty of "action."

They were beyond what was necessary to the exercise of any right of theirs and invaded the right of a third person.

This is also the ground work of the decision in *Walker vs. Cronin*, 107 Mass., 555, and cases there cited.

Robinson vs. Texas Pine Land Assn., 40 S. W., 843.

We think it follows from this consideration of cases that malevolent intent is never considered potent to transform into a wrong a lawful act done in the exercise of a legal right which requires for its exercise that very act; but that malice may affect the quality of those indifferent acts, many of which are not illegal by themselves. In each of the cases cited in the notes to *Passaic Print Works vs. E. & W. Dry Goods Co.*, 62 L. R. A., 673, and in the cases hereinbefore cited in which malevolent intent was considered material, the acts done by defendants were not essential to the exercise of their legal rights. That is to say, their legal rights could be exercised and they could have the direct advantages flowing therefrom without committing the act charged. If the accused have a legal right and from any act necessary to the exercise of this legal right loss comes to another, the fact that the act was necessary to the exercise of the legal right justifies the act, because its exercise is part of the defendants' legal right. But if the act charged against the defendants is not absolutely necessary to the exercise of this legal right, although a remote benefit might result therefrom, then we come within the second class of cases aforesaid. For illustration, a man or body of men have the right, collectively or singly, to make contracts not forbidden by law, with

whom they please and on what terms they please. This right involves for its exercise the refusal to contract with any person except on terms. This right to refuse to contract, except upon conditions made by the party refusing, lies at the foundation of all contracts. The making of every contract involves this act and without the exercise of this act of refusing except upon terms no contract could ever be entered into. It is necessary to the exercise of the right to make contracts and hold and enjoy property that the party refusing may annex to his refusal whatever conditions he pleases. Consequently his motives for refusal or for agreeing cannot be inquired into, because such inquiry would limit or destroy that right. Just as soon as you inquire into his motives and finding his purpose malevolent deny the right, you have established a right in the opposite party, and if the opposite party is induced by malevolent motives to make the inquiry into the motives of the first party he would be committing a wrong himself. This would merely mean that every right was a wrong. The Wisconsin Supreme Court in the habeas corpus case said, speaking of Section 4466a (opinion p. 249), "The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful (unlawful ?) act intentionally done." But when that court leaves the consideration of the requirements of the statute and comes to the consideration of the acts done, it affirms that the acts were unlawful only because they were malicious and impliedly, if not expressly, admits that the same acts would have been lawful, that is to say, not wrongful, if they were done from proper motives, meaning, done to benefit the defendants in the way of trade competition. Malice figured out in this way must necessarily be malevolent intent. Because it cannot be said that identically the same act can be lawful when committed with one intention and unlawful if committed with another intention if we are discussing malice in law. There is in that case no difference in the premises except the difference in intention. *There is nothing then for the legal inference of malice to rest on except the actual malevolent*

intent. That is to say, the malevolent motive makes the otherwise legal act a wrongful act and being thus made wrongful the law implies malice from its commission as it does from any other wrongful act. The opinion thus states that the statute under consideration calls for malice in law, and proceeds to satisfy the call of the statute by an inference of malice in fact or malevolent intent.

This condition was something of a puzzle on the first hearing in this Court and there was some doubt expressed in regard to whether the Wisconsin Supreme Court was considering malice in law or malevolent intent or purpose. We therefore analyze the matter with some detail as follows:

(1) If a certain act or group of acts is declared to be lawful when not done from malicious motives or with malicious intent and unlawful when done from malicious motives or with malicious intent, in such declaration malice necessarily means malevolent intent because the law could not infer two opposite conclusions from the same act or the same group of acts and because the addition of the term malicious intent is made to the premises of fact from which the conclusion of illegality is drawn.

(2) But having added to the certain act or group of acts the fact of malice the Wisconsin Court then derives the conclusion that the act or group of acts plus the fact malice was unlawful.

(3) Having thus found the quality of the act plus the fact of malice wrongful that Court starts with this conclusion as a new premise and draws the next legal conclusion therefrom as follows, namely: the law infers malice from the wilful commission of unlawful acts. The acts in question were unlawful acts because they were performed with malice in fact or malevolent intent, hence the law infers malice from their wilful commission. What is this but saying that the law infers malice from malevolent intent?

But when the Wisconsin Supreme Court came to make its decision to which this writ of error runs there was no such uncertainty. Because it there held that a plea that the acts charged were "done, harbored, made and entered

into in trade competition," (Record, p. 22), was no justification nor defense. So whatever may have been the effect of the original decision on habeas corpus, on this question of malice or malevolent intent the decision to which the writ of error runs and which is here for review holds that the acts charged against the accused were *unlawful acts from which the law infers malice and further that they could not be justified on the ground of trade competition. In other words, that malice was conclusively presumed as it is from any unlawful act wilfully done.* (This contradicts the decision on habeas corpus in the same case.) Let us see what further this means. Does it not affirm that under the statute in question the exercise of the right of liberty to contract, or what is the same thing, the right to refuse to contract with any person whom they choose and on what terms they choose is in Wisconsin a legal wrong, an unlawful act which cannot be justified upon the plea of trade competition if some other person lose trade on account of such refusal. Is not this incorrect as law and unconstitutional by all the authorities? It seems to us that nothing more than the foregoing statement is necessary to bring about a reversal of the several judgments of conviction. But because a rehearing has been ordered we feel bound to present this case from every viewpoint which so far as we can see could in any event be considered relevant. To hold that in law a person or class of persons possesses a legal or constitutional right, but shall be responsible in damages to every other person and to the public criminally in cases where loss or damage ensues to another from the exercise of that right, is to hold that every legal right is a legal wrong. Because this is always and in all places the criterion of a legal wrong, viz: that he who commits it is liable to respond in damages to any person suffering loss of which that individual act is the proximate cause.

VII.

CONSPIRACY.

It may be proper to consider briefly and as accurately as possible the common law of criminal conspiracy in considering its effect upon the nature of the act charged in the information.

The common law against criminal conspiracy prohibited a combination or agreement (1) for the purpose of effecting or carrying out any act by unlawful means, and (2) for the purpose of effecting or carrying out an unlawful act by any means. The distinction between (1) and (2) from the viewpoint of common law pleading was considered important, but otherwise it is merely verbal and unsubstantial. Because in (1) as well as in (2) there is an agreement to do an unlawful act, the only distinction being that in (1) the unlawful act agreed to be done is incident to the main purpose of the agreement while in (2) the unlawful act agreed to be done is the main purpose of the combination. In either case the subject of the prohibited agreement is unlawful, either as a means or as an end. But great uncertainty and some confusion exists both in this rule and in its application by the Courts, growing out of the use of the word "unlawful." For that word might denote what Blackstone terms a "public wrong," that is to say, a crime or misdemeanor, or it might denote what the same author terms "a private wrong." It might even cover a breach of some duty owing to another person, as the duty of a master to furnish his servants with reasonably safe appliances, or a duty raised by contract, as that of a warrantor to make good his warranty. Or it might denote a mere civil trespass. The word "unlawful" might also mean not alone criminal or indictable outside of and independent of the law of conspiracy, but also be taken to include acts injurious to the public (public wrongs) which are not crimes or misdemeanors nor indictable under any rule of statute or common law outside of the common law of conspiracy. There are many such cases. In these the Court undertakes in each case as it comes up, by the process of special inclusion and exclusion to determine whether the act concerning which the

prohibited agreement is made is "unlawful." This is much the same manner in which questions of fraud are decided and much the same manner in which that part of the criminal common law not based upon early statutes was brought into force. (1 Wharton's Criminal Law, Tenth Edition, Chapter 2.) The Courts are reluctant in such cases to lay down rules or limitations, but one limitation is constant and invariable in all criminal prosecutions, viz: the act under consideration must be one which affects the public injuriously as subversive of morals, public peace, liberty, injurious to trade or some other public interest. Where the prohibited agreement concerns the doing of an act which is a mere private wrong, a civil trespass or a breach of duty and only in that sense is unlawful, there is in the nature of things in the law of criminal conspiracy always this limitation: that the agreement will not constitute a criminal conspiracy unless the public interest be also injuriously affected by the commission of the act intended or agreed upon, either as a means or an end. Whenever the Court declares any combination or agreement a criminal conspiracy it, of course, affirms that public interest is injuriously affected by the act agreed to be done or by the association or combination. *State vs. Glidden*, 55 Conn., 46; 8 Atlantic Rep., 90, is a good illustrative case. There the defendants were informed against for conspiracy to injure and oppress the workmen then in the employ of a certain corporation by depriving them of their employment by means of a boycott, and a conviction on this information was sustained. In this respect the conspiracy was to do an act injurious to the private rights of the workmen, but it was of such character, threatening the peace of the community, and so widespread and formidable in its organization by reason of numbers, that it also affected the public; and consequently the Court pronounced it a criminal conspiracy. But the Court also said: "Suppose two or more boys, for instance, agree to go upon another's land. The proposed act is, or may be, a trespass and therefore unlawful. If they do not go no harm is done. If they do go they are or may be liable civilly, but no one would seriously contend that in their case they

would be liable criminally for conspiracy. But suppose two or more conspire unjustly to deprive another of his liberty or property. Then, as we shall hereafter see, the criminal law may take cognizance of the act." This commends itself to reason and shows that there may be conspiracies to do some unlawful act which have in them no element of *public wrong* and therefore cannot be prosecuted criminally and can only be prosecuted civilly in the action of conspiracy *if damage results*. Some Courts, adhering with great honesty of purpose to the pleasing fiction that Courts do not make law but only declare the law, have ruled that the unlawful act which is the subject of agreement must be itself and by some rule of law outside of the law of conspiracy laid down in the particular case, a crime or a misdemeanor. In the opinion of Mr. Wright (Criminal Conspiracy, Section 14) the weight of authority sustains this view. But be this as it may, this view of the law possessed the merit of certainty and the demerit of inadequacy. It had no doubt in some degree this characteristic of all early law, the product of conditions in which trade relations are less complicated and in which liberty is prized above ease and absolute safety. Other Courts have, however, ruled that the unlawful act which is the subject of the prohibited agreement need not be a public wrong but that it will be sufficient to constitute the offense of criminal conspiracy that the act concerning which the agreement is made violates some private personal or property right of a third person, as is said in *State vs. Buchanan*, 5 Harr. & J., 317. This latter proposition carried out to its logical conclusion would result in making every breach of duty imposed by law for purely private ends, or every breach of contract by two or more who were jointly and severally bounden either by the duty or by the contract, indictable as a public wrong; while where only one was bounden to a like duty or a like contract his breach thereof would be a mere private wrong. Other elements of uncertainty were introduced when it was held that the unlawful act which was the subject of the prohibited concert or agreement might be an act which was wrongful in the sense of being a public wrong if agreed upon

by two or more, although not indictable outside of the common law of conspiracy, in case such act was "by reason of the power of the combination particularly dangerous to the public interests," or, "particularly injurious to some individual." *Commonwealth vs. Waterman*, 122 Mass., 43, and cases, pages 57 opinion.

And an immoral act, not indictable if committed by one, when committed by numbers in pursuance of a common object *so it becomes dangerous to the public interests*, constitutes an unlawful act and an agreement or association for the purpose of effecting such act becomes criminal. *State vs. Burnham*, 15 N. H., 396.

Some of these extreme views are criticised in *2 Wharton's Criminal Law*, 10th Edition, Section 1338, Chapter 21.

Now under the most far reaching decisions on the common law of conspiracy and granting the power of the Courts as claimed by Wharton to declare an act a misdemeanor which is injurious to the public interests although no statute or precedent has prior to that time so declared, still there are at least two limitations to be observed. First, no legislature and no Court could declare the exercise of a right secured to any person by the constitution a misdemeanor *where the proper or legal exercise of that right involves co-operation in order to carry it out*, such as the right to contract or the right to compete in business, because the Court could not declare this a misdemeanor because participated in by two or more, without denying or disaffirming that constitutional right. Second, whatever may be the power of the legislature, the Courts cannot pronounce an act a misdemeanor unless it affects some public interest injuriously. We contend that we come in the case at bar within both these exceptions to the far-reaching power of the Court in conspiracy cases. The right of liberty to contract and to engage in trade and business necessarily involves combination and co-operation. As quoted in a former brief filed herein from the proceedings of the American Economic Association of 1899, pp. 78-173, at page 109:

"There is no clear dividing line between individual and "group competition. In a certain sense it may be said that "there is no individual competition, since the competing person "always draws aid and comfort of one sort or another from "other persons. So far as man is social and not merely animal "he is the center and in a sense the product of a complex web "of relations and influences from which he can in no way be "separated unless by death. By group, however, is ordinarily "intended in this connection a definite association with distinct "purposes and organization. One of the chief purposes of the "creation of such groups is to compete more effectually."

So that if there is a constitutional right of liberty to contract and to enter into trade relations and to carry on business and to enter into competition in trade, *that constitutional right involves the right of concert, association, combination* for that purpose, and cannot be punished as a common law criminal conspiracy *because in the nature of things the combination and association is essential to the exercise of that constitutional right.*

In the case at bar it is also difficult to discover any public wrong. That the complainant might on account of the combination in question be required to recede from its raised prices cannot be considered a public wrong unless it could be thought that the public was more interested in the alleged oppression of the Journal, which oppression consisted in enticing away its advertising customers, than the same public was interested in the question of rates. But it may be answered that the public interest is that no group of men shall exercise their right of competition from malicious motives or from other than selfish motives. This claim, however, would be fatal to the judgment in question because it would render either this particular right or any other constitutional right that the legislature might next seize on capable only of exercise when the motives accompanying its exercise were approved by the jury.

As we understand it, the learned Attorney General must admit and does admit that either one of the accused acting alone had the right under the Fourteenth Amendment to the United States Constitution to proclaim and insist that he would

make no contracts of advertising for hire with any person who patronized the Journal and paid its increased prices, unless such person would pay him three times that sum and that his motives in so doing would be immaterial and could not be inquired into.

But it is claimed, as we understand it, that the accused could not associate themselves together for the same or a similar purpose without becoming liable to criminal prosecution. The nearest he can come to supporting his claim by authority is, "that there are many things lawful when done by one alone which become unlawful when done by many in pursuance of a combination for that purpose." If this is true what of it? Competition and trade contracts is not one of these "many things" because *concert of action, association and combination are absolutely essential to the exercise of the right of "liberty to contract" as well as to the exercise of the right to engage in competition.* His contention is thus reduced to absurdity. The right of liberty to contract, which includes the right to contract with whom he pleases, on what terms he pleases, and to refuse to contract with whom he pleases, can only be exercised alone and not in connection with others interested in like contracts and engaged in the same business, and the vague statement above quoted from the common law of conspiracy is paramount to the constitution.

This statement above quoted from conspiracy cases has reference in cases of criminal conspiracy to the consideration of whether or not the act is a "public wrong" and when we find this statement used in civil actions for conspiracy it has reference to what the Court calls the extent of the damage but really refers to the question of whether or not the persuasion or solicitation of persons not to deal with the plaintiff has reached the extent to constitute a legal wrong analogous to the wrong committed by libel.

That the act of combining can never be considered a wrong or a crime when done in the exercise of a legal right or attempted exercise of a legal right which requires for its exercise

combination or cooperation notwithstanding a malevolent purpose is admitted in some of the cases by demurrer.

Orr vs. Ins. Co., 12 La. Am., 255.
Hunt vs. Simonds, 19 Mo., 583.
Anderson vs. U. S., 171 U. S., 604; 19 Sup. Ct. Rep., 50.
Docter vs. Riedel, 96 Wis., 158.
Bowen vs. Matheson, 14 Allen, 499.
West Va. Transportation Co. vs. Standard Oil Co., 30 W. Va., 611.
In re Grice, 79 Fed. Rep., 627.
Adler vs. Fenton, 24 How., 407.
Bohn Mfg. Co. vs. N. W. Lumber Assn., 21 L. R. A., 237.
For a very good illustrative case see *Kearney vs. Lloyd*, 26 L. R. (Irish), 268.
South Royalton Bank vs. Suffolk Bank, 27 Vt., 505.
Boyer vs. West. Union Telegraph Co. et al., 124 Fed. Rep., 246.

VIII.

DAMNUM SINE INJURIA.

It was not by chance or subtile invention that the rule of *damnum absque injuria* came into the Roman law and from that into the English law. In the nature of things there must be such principle in every system of law. It is the necessary result of rules, the necessary result of the establishment of rights. No human mandate can prevent loss. Loss must inevitably come from authorized acts or the exercise of legal rights as well, if not as often, as from unauthorized or forbidden acts. To attempt to hold the person doing such authorized acts liable for the *loss* caused thereby as for an injury would be to hold the act authorized by law unlawful where it caused loss and consequently *on a par with wrongful acts*. It is one thing to hold that he who in the exercise of his legal rights injures another shall respond in damages, because this supposes a clash of rights; but it is quite another thing to hold (as the Wis. Sup. Ct. did) that he who in the exercise of his legal right causes loss to another shall respond in the Courts for that loss, because this makes the exercise of the legal right

an illegal act by subjecting it to the same consequences as follow the commission of an illegal act and measuring it by the same criterion we employ in determining the quality of an illegal act. If the exercise of a legal right on the part of one could be said to cause an injury to another and we involve ourselves in no contradiction of terms thereby, the result is not that all legal acts become wrongful in the latter case, but that all legal acts become indifferent and may be exercised with impunity where they do not conflict with other legal rights and in the case of a clash of legal rights we do not see why each party should not recover from the other. One may be quite as "malicious" as the other. But when the Court pronounces an act such as the act of making a contract or refusing to make a contract or annexing conditions to a contract or engaging in trade competition, *illegal* and therefore punishable, it gives to the party who has sustained loss or injury thereby *a correlative right;* so far as the first party is adjudged guilty of a wrong the second party is adjudged the possessor of a correlative right. The consequence of this is that when the accused are punished for causing loss to the complainant by winning away its customers by a joint or concerted action in offering such customers the advantages hereinbefore described it is at the same time adjudged that the complainant had a legal right to maintain its trade and hold its customers against any such joint attack. We need not elaborate upon how destructive of competition that is and we have further discussed this question in the section entitled, "Equal Protection of the Law."

IX.

THE PLEA.

If we are wrong in our position that it appears upon the face of the information that the acts charged were acts of trade competition and did go beyond what is absolutely necessary to the exercise of the constitutional right of liberty to make lawful contracts with whom and upon what terms the accused choose, and that in such case the motive for refusing to con-

tract cannot be inquired into, then and only then the sufficiency of the plea of the accused to the effect that the acts charged were done in trade competition must be considered. We contend, of course, that this Court cannot reach the plea, because before it arrives at the plea and its sufficiency it must consider the information and that the information can only be sustained by denying a constitutional right of the accused. But if the liberty to refuse to enter into contract relations with another is not a constitutional right but a mere privilege and the right to engage in business in competition is not a constitutional right but a mere privilege which can in either case be exercised only when accompanied with proper motives or for ends or purposes which the legislature or courts of a state may think proper, surely even then there must be some justification permitted by the courts when a man is arrested for exercising such privilege. The justification here attempted was that of trade competition. Under this plea the defendants would have been allowed to prove the nature and extent of their business, their relations as competitors with the party who lost customers, the nature of the advantages which would result to them from their combination in a competitive way, and they could go further and if motive, purpose or malice in fact is any ingredient of the offense charged in the information, they could, under this plea, show they had no purpose outside of the trade competition, quoting from *Potter vs. U. S.*, 155 U. S., 438:

"As willful wrong is of the essence of the accusation, testi-
"mony bearing directly on the question of willfulness is of vital
"importance, and error in rejecting it can not be regarded other-
"wise than as material, and manifestly prejudicial."

See also *Felton vs. U. S.*, 96 U. S., 699.
Sherburne vs. Rodman, 51 Wis., 474.

But the accused were convicted on a demurrer admitting the truth of this plea. There can be only one interpretation placed on this decision and that is that in Wisconsin trade competition is no justification in a prosecution under the statute in question, even *where the only damage complained of is loss of customers.* That is to say, under this construction

of the statute in questioon if two or more business men were engaged in some business and combined their skill and resources and agreed not to enter into contracts of advertising for hire with those of their customers who divided their patronage with a competitor and paid such competitor certain recently raised rates, they will be liable criminally if by so doing they win away any customers from their competitor. More than this, even if the refusal to enter into contracts of advertising for hire with those who patronize a competitor and pay him his recently raised prices is not absolute but only conditional and the condition is such that the customer in such cases shall be required to advertise in all three associated papers and pay each rates equal to the recently raised rates of the competitor, so that the agreement only affects such advertisers as really desire the services of one or more of the associated papers and only tends to draw off from the competitor such advertisers as desire to go into one or more of the associated papers, so there can in no event be a loss to the competitor therefrom without a corresponding gain to the associated papers, still this condition will not make the transaction innocent nor can the act be justified *by any circumstances of trade competition.* Now as all competition is wilful and is intended to cause loss of business patronage to the unsuccessful competitor all competition is illegal in Wisconsin. This would seem to us rather incredible and were it not for the decision of the Wisconsin Supreme Court in *Hawarden vs. Youghiogheny Coal Co.,* 111 Wisconsin, 549, 550, we would be constrained to believe the decision to which the writ of error runs a blunder or an inadvertence. But it is not such. It is the deliberate judgment of the Supreme Court of Wisconsin, and we say that if the statute in question makes the act of co-operation in trade competition under the circumstances aforesaid a criminal offense and the act an unlawful act from which malice is conclusively inferred, that is to say, which admits of no justification without denying the facts aforesaid, it seems to us not only to be unconstitutional beyond all question, but very oppressive and unjust besides. There is a class of cases in England which holds

that certain injuries to business otherwise unlawful or at least actionable, can be justified if it be shown that the acts were done in trade competition. We do not think those cases apply or were ever applied to a case where the alleged wrongful act complained of went no further than an agreement among two or more interested parties not to deal with those who did not patronize them exclusively or merely to offer better terms to those who patronized these two or more persons exclusively. If the theory of justification is ever applied in such case last mentioned the liberty to contract is at an end. But we do not think it has been so applied but is applied rather to those indifferent acts which lie on the border line of the right of liberty to contract and are not essential to the exercise of that right and may be either acts of competition or acts of oppression and where the liberty of the opposite party is infringed and the advantage to the doer is remote. *Giblan vs. National Amalgamated Labourers' Union of Great Britain and Ireland*, L. R. 2 K. B. Div., 1903, page 600, is such a case. That was a case of preventing a workman from obtaining employment in order to compel him to pay a debt honestly due to the labor union. *Glamorgan Coal Co. vs. South Wales Miners' Federation*, L. R. 2 K. B. Div., 1903, page 545, is another. That was a case of the intentional interference with contractual rights by inducing workmen to quit work for a time contrary to an existing agreement. In *Martell vs. White*, 69 N. E. Rep., 1085, elsewhere commented on in this brief, the same view of necessity for justification is suggested or decided in the case of a voluntary association imposing heavy fines on those of its members who entered into contracts with the plaintiff. The necessity for justification is mentioned in cases cited in *Martell vs. White supra*. In some of the last-mentioned cases it is recognized that trade competition is a justification in cases where *injurious* acts were really done in the exercise of that right. While disclaiming that the acts charged in the information against the accused were such acts as require any justification, because they were legal acts and inflicted no *injury* in the legal sense of the latter term, yet if we were mistaken in this and the acts

charged belong in the same legal class with the acts committed by the defendants in *Martell vs. White, supra,* for example, then the rights of the defendants were denied by the Wisconsin Supreme Court when it refused to permit the defendants to justify under a plea that the acts were done in trade competition and the judgment of the Court below must be, for this cause alone and on this ground alone, if on no other, reversed.

X.

THE CONSTITUTIONAL QUESTION.

We have endeavored to show in Chapter I. of this brief the nature and character of the rights claimed here by the accused and how such rights were regarded by the Courts, incidentally covering in this showing the following cases holding statutes unconstitutional which denied or unduly restricted such rights.

Niagara Ins. Co. vs. Cornell, 110 Fed. Rep., 816.

State vs. Julow, 29 L. R. A., 257.

People vs. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343.

In Chapter II. of this brief we have endeavored to present a review of the statute in question and of the contents of the information. In Chapter III. we have endeavored to sustain the proposition that the acts charged in the information were acts of recognized and legitimate trade competition, that a direct and certain benefit resulted therefrom to the accused and that these acts were of such character that their denial involved an encroachment upon the liberty to contract of the most serious nature. In Chapter IV. we have endeavored to show that to punish one for refusing to contract or for annexing conditions to his refusal on the claim that such refusal was malevolent in fact or malicious in law, would destroy the liberty to contract by striking at such liberty in a most vital point. In this chapter we run across the following cases, cited there to sustain the argument of that Chapter but also involving questions of Constitutional Law, viz:

Coffeyville Etc. Co. vs. Perry, 76 Pac. Rep., 848.

State ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530.

Allgeyer vs. Louisiana, 165 U. S., 578.
Wallace vs. Rd. Co., 94 Ga., 732.
People vs. Warren, 34 N. Y. Supp., 942.
Com. vs. Perry, 155 Mass., 117; 28 N. E. Rep., 1126.

In Chapter V. we have endeavored to set forth the true grounds upon which the illegal strike cases and boycott cases rest and to show that they are not based upon mere malevolent purpose but the acts committed are unlawful because not necessary to the exercise of a right which the law gives the doer and at the same time invading a legal right of liberty to contract or some analogous right which the law gives the other party. In Chapter VI. we have endeavored to show that it was never considered lawful or proper to inquire into the motives with which a person did certain acts necessary to the exercise of a legal or constitutional right possessed by him because such inquiry impaired or destroyed that right but that such inquiry was sometimes made with regard to indifferent acts, that is acts legal merely because they were not forbidden by law. In Chapter VII. we have endeavored to show that by the common law of conspiracy the act of combination or the agreement to combine can never be an offense when the act is in pursuance of a legal right which legal right for its exercise requires co-operation or combination.

We have now in the light of the cases and principles aforesaid to present the question directly with reference to the mandate of the Constitution that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

If it is true that it is an essential part of the constitutional right of liberty to be free to singly or together form contract relations with whom one pleases and refuse to form contract relations with whom one pleases and this right is denied or even impaired by construction given to the Wisconsin statute in question, then of course a constitutional question arises upon which the Court should reverse the judgment below and hold the statute thus construed unconstitutional. Of course to re-

fuse contract relations and annex conditions to that refusal is the whole basis of the right to contract. Every contract consists of a refusal to contract except on the conditions made by one and acceded to by the other party. Most of the authorities hold that refusal to contract or the condition annexed to such refusal may be, as said by Cooley, the result of, "whim, caprice, prejudice or malice." Can the Supreme Court of Wisconsin say *the conditions annexed to the refusal to contract must be such as are beneficial to the person refusing?* We answer, not if there is such a thing as liberty of contract; because this paternalistic regulation of the refusal to contract is not liberty to refuse, but a denial of the person's right to refuse to contract, in all cases where the Court (or the legislature) may think that a loss (not an injury) will result to some third person therefrom and no advantage to the person refusing. If this is "liberty" what is "paternalism"? The Court will observe we put it, for argument, more strongly against ourselves above than the facts here warrant, because we assume a case where there is no benefit accruing to the person or persons from his or their refusal to contract or from the conditions which they annex to their refusal, which is not the actual case here, although it was the hypothesis upon which the Supreme Court of Wisconsin decided this case.

Again the legislation of Wisconsin in question, as construed by its Supreme Court, declares this refusal to contract except on condition, when the condition causes loss to another and is not beneficial to the person making the condition, an unlawful act from which malice is inferred and so brings the act within the terms of the statute, Section 4466a. This is precisely the same in its effect upon the right of liberty to contract and in its effect upon the accused as if the statute in question by express words covered the case in question. *Whatever acts the Court of Wisconsin could declare malicious of course the legislature of Wisconsin could declare malicious and we submit that it is also true by reason of the constitutional rule governing both the Court and the legislature of Wisconsin that whatever acts the legislature of Wisconsin could not declare ma-*

licious the Court of Wisconsin could not declare malicious. It is also true that a legislative declaration that an act is unlawful is equivalent to a declaration that that act is malicious in law, and that a legislative declaration that a certain act is malicious is the exact legal equivalent of a legislative declaration that the same act is unlawful in its effect to forbid or prohibit the act. The same result—punishment—follows its commission. So that declaring an act unlawful by statute is equivalent to declaring its wilful commission a malicious act and declaring a certain act done in a certain way to be malicious in law is the exact equivalent of declaring it unlawful.

Hence could the legislature or the Courts of Wisconsin or the legislature and the Courts of Wisconsin declare: *"It shall be unlawful for two or more persons to associate together and refuse to enter into contract relations with third persons basing that refusal upon any condition which may cause loss (not injury) to such third person and does not benefit such two or more persons."* This we submit is a correct statement of the rule laid down in the instant case by the Supreme Court of Wisconsin.

To put this in another way: The illegal features found by the Wisconsin Court in the acts of the accused are (1) that two or more associated in the refusal; (2) that there was a refusal to contract except upon condition; (3) that the condition so annexed to the refusal tended to cause loss of customers to a competitor; (4) that the condition annexed to the refusal did not benefit the persons refusing; (5) that the refusal and condition were made known. We only dispute (4) as incorrect in fact. But even on the hypothesis that each proposition above numbered is correct, which of the foregoing could be prohibited without denying the liberty to contract and the liberty to engage in trade and carry on competition? Are they not each acts vital to the enjoyment of these rights and *necessary to their exercise?* Could the legal right to contract or refuse to contract be exercised if you prohibit (1)? (2)? (3)? (4)? (5)? Would it be possible to say there was such a thing as liberty to contract if you prohibit the combination of all?

A statute of Missouri quoted in the statement in *State vs. Julow*, 129 Mo., 163; 29 L. R. A., 257; made it a misdemeanor for any employer to enter into any contract with an employee requiring the latter *to withdraw from any trade union, labor union or other lawful organization, or to require said employee to abstain from attending any meeting of the people called or held for lawful purposes or to by any means compel or coerce any employee into withdrawal from any lawful organization or society.*

Notice that all the acts forbidden to be prohibited by the employer were acts which the employee had a legal right to do. Just as the Journal had a legal right to raise its prices or the advertising traders had a legal right to patronize the Journal and pay the increased price if they chose to do so. But the statute did not merely make it a misdemeanor for the employer to prevent his employee from doing these lawful acts, it went further and forbade the employer *to enter into any contract or agreement* requiring the employee to desist from the exercise of these lawful acts. This made the entering into such contract a wrongful or illegal act by express enactment while the Wisconsin statute under consideration here, as construed by the Supreme Court of Wisconsin accomplishes the same result, but more indirectly by declaring such act fraught with legal malice and therefore unlawful. The Missouri statute declared an act necessary to the exercise of the liberty to contract unlawful, hence malicious. The Wisconsin statute (as construed) declared the same kind of an act malicious, hence unlawful. This is a mere difference in words. The effect on the right of liberty to contract is the same in either case, viz: to impair or prohibit such right; the condition annexed is the same in either case, viz: that the person in question will refuse contract relations except on condition that the other party forego a right of his.

The Missouri Court held this statute unconstitutional as depriving one of his liberty to make contracts and that it could not be considered a police regulation because it did not promote or tend to promote the public health, welfare, comfort or safety

and that even if it had such tendency the state would not be allowed under the guise and pretense of a police regulation to encroach or trample upon the just rights of the citizen which the constitution intended to secure against diminution or abridgement.

The Court rests this decision upon the following cases:

State vs. Loomis, 115 Mo., 307; 21 L. R. A., 789.
Com. vs. Perry, 155 Mass., 117; 14 L. R. A., 325.
Godcharles vs. Wigeman, 113 Pa. St., 431.
State vs. Goodwill, 33 W. Va., 176; 6 L. R. A., 621.
Re Jacobs, 98 N. Y., 98; 50 Am. Rep., 636.
People vs. Gillson, 109 N. Y., 389.
Millett vs. People, 117 Ill., 294; 57 Am. Rep., 869.
Ritchie vs. The People, 155 Ill., 98; 29 L. R. A., 79.

The foregoing cases we submit fully sustain the decision in *State vs. Julow, supra,* and this latter case we submit is directly in point here. The State of Missouri certainly had or could have as great an interest from the standpoint of state policy or police power in legalizing labor organizations as the State of Wisconsin could have in sustaining existing business concerns against loss of customers. The loss caused to the discharged employee in *State vs. Julow, supra,* was the loss of an opportunity to earn money working for hire, the same kind of loss complained of by the Journal here. The right of the employee invaded in *State vs. Julow* was one recognized by the law while the right of the Journal in the case at bar is not to the same extent recognized by the law. The refusal to continue contract relations was the same in either case, in that it was a refusal except on condition. The condition of the refusal to continue contract relations in *State vs. Julow* was one which required the employee to forego the assertion of a right on his part, but this is true of all contracts. The refusal to continue contract relations in *State vs. Julow* was on condition that the person refused forego some right of his which it would cause him loss to forego and there was no immediate or apparent benefit to the employer in insisting on this condition; at least none that the Wisconsin Supreme Court could see. In the case at bar the refusal to continue or enter into contract relations

was conditioned upon the advertiser employing all three accused, or else refusing to employ the competitor of accused at its higher prices, and was advantageous to the persons making the condition and as we have seen besides was done in competition. But this case of *State vs. Julow, supra,* discloses also that it is essential to the liberty of contract as stated by Cooley that it be held that one may refuse on any condition he chooses to impose or absolutely without giving any reason therefor or from "whim, caprice or prejudice." Because in the Julow case the decision necessarily covers the proposition that it is essential to the liberty of contract that one may refuse to enter into contract relations without being called upon to give any reason for refusal. It covers this because it covers the proposition that no law is valid which makes illegal the refusal to contract with one unless the latter will surrender some legal right, no matter whether the power of the state declares that there is no benefit accruing from such refusal, or from such condition annexed to such refusal; and covering this it covers all minor considerations included therein. If the *State vs. Julow* was correctly decided then the case at bar was incorrectly decided by the Wisconsin Supreme Court, because precisely the same points are involved which summed up may be stated thus: The state has power (case at bar) has not power (*State vs. Julow*) to declare what shall not be sufficient reasons for refusing to enter into contract relations with another.

A statute providing among other things that no person shall discharge an employee because he is a member of any labor organization was held unconstitutional on similar grounds in *State ex rel. Zillmer vs. Kreutzberg,* 114 Wis., 530. The case is in point here for the reasons aforesaid. Many authorities are cited, among them the following decisions of this Court to the limitations on the police power:

Mugler vs. Kansas, 123 U. S., 623, 661; 8 Sup. Ct. Rep., 273.

Lawton vs. Steele, 152 U. S., 133; 18 Sup. Ct. Rep., 499,

and also the statement hereinbefore quoted from Mr. Cooley's work on torts, and says (op. p. 540):

"*Free will* in making private contracts and even in greater "degree in refusing to make them is one of the most important "and sacred of the individual rights intended to be protected. "That the present act curtails it directly, seriously and prejudi- "cially cannot be doubted."

Is not the foregoing also true of the statute 4466a as construed in the case at bar?

Does it not "curtail" free will in making private contracts to a much greater extent, reaching not only the contract of labor but all other contracts to declare that all refusal to contract except on conditions causing loss to another, shall be criminal because malicious, than it does to declare that the single contract of labor shall not be terminated or refused for a single specified insistence of the laborer in what is his lawful right?

To the same effect and covering the same question is *Coffeyville, etc., Co. vs. Perry*, 76 Pac. Rep., 848.

The statute here held unconstitutional was in somewhat different language and was evidently drawn with a view that joining a labor organization was a rightful and lawful act and hence the employee had a right to perform that act free from coercion and *that the state could make any act of coercion of this kind a misdemeanor*. And so far the draughtsman of the statute was probably right. But when he came to provide that discharge or threats to discharge should not be used for this purpose he went too far. Because he then invaded the liberty to contract and undertook to punish a man for refusing, or refusing to continue, contract relations *for what the legislature thought an insufficient reason and declared to be an insufficient reason causing loss to the employee*. This decision shows that Cooley was right when he said "whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice," it is still within the person's constitutional right.

For if the legislature can constitutionally say that it shall be a misdemeanor to coerce another to forego a lawful right, but cannot constitutionally say that a person shall be punished for refusing to contract with another unless that other forego

such right, does it not follow that the legislature cannot make the refusal to contract a misdemeanor on any ground, much less on the ground that such refusal caused loss to another and brought no good to the person refusing?

In *Gillespie vs. People*, 188 Ill., 176; 52 L. R. A., 283; a like statute was held unconstitutional.

Here the offense consisted in an employer who needed and was employing men, refusing contract relations of this kind with one who applied for work on the ground that the latter was a member of a labor union. The Court said *inter alia:*

"The legislature cannot prevent persons who are *sui juris* "from laboring or from making such contracts as they may see "fit to make relative to their own lawful labor; nor has it power "by penal laws to prevent any person *with or without cause* "from refusing to employ another or to terminate a contract "with him."

The contract of "advertising for hire" is really a contract for labor and services and the constitutional question depending upon this writ of error is answered by the foregoing decisions on several points, (1) as to the disability of the legislative body under the constitution to enact such laws, (2) that such laws are not a lawful exercise of the police power, (3) the scope of such law goes beyond what can be justified under the police power of the state.

Turning to other contracts and bearing on the scope of restriction with reference to an act of the legislature making it a penal offense for a merchant to sell off his stock of goods in bulk, see *Block vs. Schwartz*, decided by the Supreme Court of Utah, March 22nd, 1904, reported 76 Pac. Rep., 22. The statute was held unconstitutional as restricting the liberty of making contracts under the Fourteenth Amendment to the Constitution of the United States.

People vs. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343; declaring a statute void, might be referred to under the general head of liberty to make all lawful contracts or liberty to engage in trade competition and is authority for the proposition that the legislature has no power to prohibit a certain kind of

lawful contracts which might be said to be a species of competition disapproved by the legislature.

Street vs. Varney Electric, etc., Co., 160 Ind., 338; 66 N. E. Rep., 895; holds a statute unconstitutional which fixed a minimum wage of twenty cents per hour on all work for municipalities.

When we leave the constitutional ground of liberty to contract and view this statute from the viewpoint of the cognate constitutional right to engage in trade and carry on competition, we find the authorities (although mostly decisions on common law questions because there has been fewer attempts to pass statutes restraining competition) to the same effect. The freedom to engage one's faculties and property in business is upheld and secured by the Fourteenth Amendment to the Federal Constitution against adverse action by the state, speaking through any of its agencies, executive, legislative, or judicial.

For example of a statute held unconstitutional because it interfered with the liberty of contract by imposing penalties for co-operation in matters of trade and contract see *Niagara Fire Ins. Co. vs. Cornell*, 110 Fed. Rep., 816; *Greenwich Ins. Co. vs. Carroll*, 125 Fed. Rep., 121; *State vs. Dalton*, 22 R. I., 77; 46 Atl. Rep., 234; 48 L. R. A., 775.

"It is not enough to bring a given business within the pro-"hibitory power of the legislature that it is so conducted as to "seriously interfere with or even destroy the business of "others." *State vs. Dodge*, 56 Atl. Rep., 983.

Cases declaring the right to engage in competition and that losses caused by acts of competition are *damnum absque injuria*, but not involving the constitutionality of any statute are found in the first and second chapters of this brief. We concede that the presumptions are in favor of the judgment below and that unless the act in question as construed by the Wisconsin Supreme Court (1) clearly interferes with the liberty to contract or refuse to contract, and (2) is clearly outside of the police power of the state as limited by the constitution the convictions below must be affirmed. But we contend that both conditions (1) and (2) aforesaid are shown to exist. If the con-

struction given to the act in question made it applicable only to a particular class or kind of contracts which might be used as a cover for fraud or gambling and did not go beyond what was necessary to prevent such evil, as in *Booth vs. Illinois,* 184 U. S., 425; 22 Sup. Ct., 425; then the statute might be sustained. But as the state under its police power could not punish one for refusing to employ another because that other was a member of a labor union without denying the generality of the proposition that persons may refuse to contract with whom they please and on what grounds they please, so the state under its police power could not punish a person for refusing to contract with one who patronized a competitor without the same broad general limitation on the right to refuse to contract. Nor could the state in the exercise of its police power prohibit combination or co-operation for purposes of trade or for the purposes of making contracts because these fall without the objects for which the police power can be lawfully exercised.

State vs. Santee, 53 L. R. A., 763, and cases in note.

We submit that this legislation as construed in the decision here for review cannot be upheld without destroying the liberty to contract, not alone to make a particular kind of contract, but all contracts which by any legislation or decision may be pronounced "malicious" because loss may be caused to another and no perceptible (to the Court or jury) gain to the party contracting and that over and beyond this the decision is not only destructive of a particular kind of competition, but all competition, because (1) all competition causes loss; (2) all competition is co-operative and by association; (3) all competition engenders enmity and often malevolent purpose.

XI.

DENIES THE EQUAL PROTECTION OF THE LAW.

The state law as declared by the Supreme Court of Wisconsin not only makes all competition criminal where the jury may find an improper motive behind it (because all competi-

tion is necessarily co-operative and necessarily unkind, and a conspiracy in this sense could be predicated of every imaginable case of competition), but it also denies to persons in that state the equal protection of the laws. Because that law as declared by the Supreme Court of Wisconsin says to A and B who have little trade patronage and associate and agree to acquire more, and to C and D, who have no trade patronage and associate and agree to acquire such patronage: "You shall not act together for the purpose of resisting by group or co-operative competition a raise of prices made by E and F who have and are enjoying trade patronage because winning away the customers of E and F is an '*injury*' to E and F." At the same time it says to E and F: "You may combine and act together to keep and hold the trade patronage which you have. Not only this, but you may invoke the criminal laws against A and B or C and D to protect you in your raise of prices and in holding the patronage you have." Consequently the equal protection of the laws is denied. Those who have not trade patronage and would strive for it, or those who have little trade patronage and would seek for more, cannot combine, associate or concert together to acquire it. While those who are enjoying large or sufficient trade patronage may combine, associate and concert together to keep it. This is an inadmissible basis of classification. If there were an absolute right of property in trade patronage, or if the business association in the field and enjoying patronage had a different right to it in the law from the newcomer, this classification into those who have and are not within the statute, and those who have not and are within the statute might be valid. But there is no property in the sense of exclusive right in anyone to the enjoyment of trade patronage. *Consequently there is no permissible legal basis of classification for the purpose of making guilty those who act together to win away a portion of it and not guilty those who act together to retain it.* Under this rule of law against which we are contending *the same acts which will constitute a criminal offense by the one class who have not patronage will not constitute a criminal offense by the other class who already have trade pa-*

tronage. This is no fanciful condition of things, but the direct and immediate result of the Wisconsin decision is to establish this rule. For is not this the real tenor and effect of their decision overruling the plea of the accused? Is it not elementary law that every rule denouncing an act as wrong establishes a correlative right? Limit the decision as much as we can and yet it establishes the right of a person in trade having customers to hold them against an association who seek to win those customers from him by offering prices, discounts or other advantage for the exclusive patronage of such customers. This on the theory that the rule established is that the act was wrongful, hence legally malicious. On the other hand, if the rule established could be said to be that it is only malice in fact that makes the acts of the accused a legal wrong, then we have established the right of one that has customers and has trade to hold them against any competition which he is able to convince a jury is malicious in fact. Whether the decision of the Court below be sustained on one or the other of these grounds, it establishes the right in a party owning an existing trade or business and having customers. In the first case, that is really the case at bar, where the Court decided that legal malice was to be inferred from the act of enticing away those customers, the decision establishes a right to hold those customers as against any such efforts as were made by the associated newspapers in this case.

A situation somewhat analogous to that in the case at bar on this point developed in the case of *Cote vs. Murphy*, 159 Pa. St., 420; 28 Atl. Rep., 190. There the Court said of the combination:

"It was not made to lower the price of wages as regulated "by the supply and demand, but to resist the artificial price "made by a combination which by statute was not unlawful; "(2) the methods adopted to further the objects of the combina- "tion were not unlawful."

The Court touches upon, but does not directly decide, this question. It says:

"If there be nothing criminal in a combination to artificial-
"ly raise wages, there can be nothing criminal in an employer's
"combination to resist the advance or to artificially depress
"them."

Why not? Manifestly because to make one act criminal and the other innocent would be to deny to the parties the equal protection of the laws. It is not what the Courts say argumentatively that constitutes the rule of law established by judicial decision, but what they decide. The decision complained of here lays down the rule that two or more cannot co-operate in competition against another business group to "injure" the latter group by winning away their customers. This establishes that the latter have a legal right to co-operate to retain their patrons or customers because their retention of such customers does not take them away from those who have them not, therefore does not "injure," while the other class, viz: those who have not trade patronage or customers, will be criminally liable for the same kind of combination and the same acts directed to acquiring new customers. If it has this effect the statute is invalid.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.
Mathews vs. Illinois, 202 Ill., 389.
Louisville vs. Louisville, 14 L. R. A., 579, and note.

Respectfully submitted,

GEO. D. VAN DYKE,
Counsel for Albert Huegin.
W. H. TIMLIN,
Counsel for Andrew J. Aikens.

APPENDIX.

Section 4466a, Statutes of Wisconsin of 1898, provided as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the purpose "of wilfully or maliciously *injuring another in his reputation, "trade, business or profession by any means whatever*, or for the "purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished "by imprisonment in the county jail not more than one year or "by fine not exceeding five hundred dollars."

From *Aikens vs. State*, 113 Wis., 419, op. 420:

"Marshall, J.: From the foregoing statement it appears "that all the questions raised in the Court below by plaintiffs "in error were considered and decided against them in *State ex "rel. Durner vs. Aikens*, 110 Wis., 189; *State vs. Huegin*, Id; and "*State vs. Hoyt*, Id. The trial court followed that decision, as "it was bound to do. As we understand the matter, the in- "formation contains the same charge as the one set forth in the "complaint, the plaintiffs in error in effect pleaded guilty there- "to, admitting the doing of all the acts charged against them, "and they were thereupon duly adjudged guilty and sentenced. "In that view the judgments must be affirmed, as all questions in "regard to the matters are *res adjudicata*, as before indicated.

"By the Court: The judgment as to each of the plaintiffs "in error is affirmed."

From opinion in *State ex rel. Durner vs. Aikens et al.*, 110 Wis., 189:

E. R. HICKS, Atty. Gen.; HOWARD VAN WYCK, Dist. Atty.; A. C. UMBREIT, Asst. Dist. Atty.; WINKLER, FLANDERS, SMITH, BOTTUM & VILAS, and W. H. AUSTIN, for plaintiff in error.

VAN DYKE, VAN DYKE & CARTER, for defendant in error Huegin.

W. H. TIMLIN, for defendant in error Aikens.

N. S. MURPHEY, for defendant in error Hoyt.

MARSHALL, J. (after stating the facts). Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, and discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation and endeavor to make the

conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the Court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by section 163, Rev. St. 1898, to appear for the state and prosecute or defend all proceedings in the Supreme Court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the Supreme Court as it is as to the district attorney in the Circuif Court. (3) The sheriff is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions:

1. If the sheriff of Milwaukee county by whom the state sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such he can not be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such can not be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was a party to the proceeding in the trial court.

We can not sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the habeas corpus proceedings, he was a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (section 3048, Rev. St. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, Id. A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment or execution, in suit," said Justice Grier, in *Bayard vs. Lombard*, 9 How., 530, 13 L. Ed., 245, quoting from early common law writers. See, also, 7 Enc. Pl. & Prac., p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel vs. State*, 71 Wis., 444, 37 N. W., 244; *State vs. Duff*, 83 Wis., 291, 53 N. W., 446, and other cases. Whether habeas corpus proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by habeas corpus is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrong-

ful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S., 556; 2 Sup. Ct., 871, 27 L. Ed., 826, opinion by Waite, C. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross vs. Burke*, 146 U. S., 82, 13 Sup. Ct., 22, 36 L. Ed., 896, the Court, speaking by Fuller, C. J., said: "It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except

for assault and battery (section 752, Rev. St., 1898), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public expense. That has often been decided. *McDonald vs. Milwaukee Co.*, 41 Wis., 642; *Manitowoc, Etc, vs. Sullivan*, 51 Wis., 115, 8 N. W., 12; *Cutts vs. Rock Co.*, 58 Wis., 642; 17 N. W., 636; *State vs. Duff*, 83 Wis., 291, 53 N. W., 446; *Frederick vs. Douglas Co.*, 96 Wis., 411, 71 N. W., 798. But it has nowhere been decided that the state's attorney, either of the county or the state at large, can not obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald vs. Milwaukee Co., supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by section 3433, Rev. St. 1898, which provides that when it appears from the return to a writ of habeas corpus that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the district attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative can not claim compensation for his services except as against the individual employing him. That is as far as the decisions of this Court go. No reason is perceived why a reputable attorney in a mere civil action can not be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation

of any right secured by the Constitution or any law to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis., 1; *In re Falvey*, 7 Wis., 630; *In re Pierce*, 44 Wis., 411; *In re Eldred*, 46 Wis., 530, 1 N. W., 175; *State vs. Noyes*, 87 Wis., 340, 58 N. W., 386, 27 L. R. A., 776; *State vs. Ryan*, 70 Wis., 676, 36 N. W., 823; *In re Rosenberg*, 90 Wis., 581, 63 N. W., 1065, 64 N. W., 299.

3. What has been said goes upon the theory that the state is the only party interested in *habeas corpus* proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we can not agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of *habeas corpus* is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of section 2629, Rev. St., 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by mandamus and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of section 2595, Id. In *Ex parte Tom Tong, supra*, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this Court declared, in *Paine vs. Chase*, 14 Wis., 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State vs. Jennings*, 56 Wis., 113, 14 N. W., 28, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so-called within the meaning of the code,

because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (section 2594, Rev. St. 1898) and that a civil action shall be commenced by the service of a summons (Sec. 2629, Id.) But the grant of power to circuit courts to issue writs of *habeas corpus* and *mandamus*, among other common-law writs, contemplated their use for the purposes they were devoted to before the adoption of the code, *i. e.*, for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and can not be changed by any legislative enactment. Whether the issuance of such a writ be called by the code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes vs. Jennison*, 14 Pet. 540, 564, 10 L. Ed. 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The Court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an Appellate Court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right—within the meaning of section 2595, Rev. St. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State vs. Smith*, 65 Wis., 93, 26 N. W. 258), and with *State vs. Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to

establish the law for this state, and has been abrogated by statute (section 3043, Rev. St. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his conduct. They were, to all intents and purposes, plaintiffs, within the meaning of section 2601, Id., regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceedings, regardless of the name by which such a party is commonly known. The statute (section 2595, Id.) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. Section 2603, Id. The term "party to a suit (or action)" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraininig them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Prac., p. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, section

3436, Rev. St. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of, the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where same question is material. *In re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People vs. Brady*, 56 N. Y. 182; Hurd, Hab. Corp., Sec. 386. That doctrine was based on a supposed common law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. Church, Hab. Corp. (2d Ed.), p. 577; *Ex parte Cuddy* (C. C.), 40 Fed. 62; *Perry vs. McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Section 3437, Rev. St. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (section 3043, Id.), effectually changed the common law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty vs. Board*, 61 Wis., 1, 20 N. W. 654; *People vs. Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant vs. Thompson*, 128 N. Y. 427, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a pro-

ceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty vs. Board*, a decision of the board of supervisors had been reversed on writ of certiorari and the board attempted to appeal. In *People vs. Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State vs. Wolfrom*, 25 Wis., 468; *Moede vs. Stearns Co.*, 43 Minn., 312, 45 N. W. 435; *People vs. Jones*, 110 N. Y. 509, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the Circuit Court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, does the warrant of commitment state any offence known to the laws of this state? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the Court charged on oath with committing the offense of conspiring to injure, and that such Court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe such person guilty thereof—shows an adequate cause for holding such person for trial. Defendants in

error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in section 4466a, Rev. St. 1898. Counsel do not state the rule of certainty, by which they contend the commitment should be tested, in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of wilfully and maliciously injuring another; that it did not literally follow the statute; and that it did not conclude with the words "against the form of the statute in such case made and provided."

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins vs. Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of

offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The Court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. "It is not necessary," said the Court, "in such an instrument, to set forth the facts constituting the offense particularly. * * * It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient." In *State vs. Everett*, Dud. (S. C.) 295, a case often referred to by Courts and text writers, the commitment considered merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan, supra*, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference

is there made to a form for commitment prescribed by statute, which is however substantially identical with one which, it is said in section 4774, Rev. St. 1898, may be used. The California Court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins vs. Brackett*, *supra*, and the cases to which we will presently refer, referred to the same authorities for support, *i. e.*, 1 Chit. Cr. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chit. Cr. Law, 111: "It is necessary to set forth the particular species of crime * * * with convenient certainty. * * * If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felon briefly, as for felony of the death of J. S. or for burglary in breaking the house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And * * * there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in Wilkes' Case, 2 Wils. 153-159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons," Number 45, tending to inflame the minds and alienate the affection of the people from his Majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the Court, on a *habeas corpus*, might be able to fix the quantum of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without specifying what he said or did, is sufficient. *It is, however, in general advisable to describe the offense concisely but in substance as an indictment.*" There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a

mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Ex parte Howard*, 26 Vt. 205; *People vs. Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Willoughby*, 14 Nev. 451; *People vs. Gray*, 67 How. Prac. 456; *State vs. Killet*, 2 Bailey, 289; *In re Kelly* (C. C.), 46 Fed. 653; 4 Enc. Pl. & Prac., pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (section 4774, Rev. St. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the offense of arson, burglary, larceny or murder by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, 46 Fed. Rep., 653; *Collins vs. Brackett*, 34 Minn., 339; and *People vs. Johnson*, 110 N. Y., 131, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is section 4466a, Rev. St. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name

of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This Court, in *Nichols vs. State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as "a mere rhetorical flourish," adding nothing to the substance of the indictment, and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy vs. State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. St. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and section 4774, Id., prescribes a form of commitment for trial that "*may be* used," which indicates that the offense should be stated "as in the war-

rant." The rule is that where a form is prescribed by statute is must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston vs. Chesley*, 52 N. H. 564. But section 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter vs. Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter vs. Frank* one of those elements was omitted. The words in the form under discussion, "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense, created or declared in section 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated section 4466a, Rev. St. 1898, the Circuit Court none the less erred in discharging them—if the complaint upon which they were arrested charged an offense

known to the law, and the record of the examination which the Court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the Court, in a *habeas corpus* suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Section 3429, Rev. St. 1898; *State vs. Bloom*, 17 Wis. 521. It is also the duty of the Court on *habeas corpus* to examine the complaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church, Hab. Corp., Secs. 231, 236; *In re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *In re Louis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Nishimura Ekiu vs U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. Ed. 554. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but on the contrary the statutes of

this state substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only *jurisdictional* defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some Courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for a trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman, supra.* Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial: "It is unimportant whether the commitment be regular in point of form or not; for this Court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the Court below ought to have done." Page 114, 4 Cranch, and page 567, 2 L. Ed. "This having been a mere inquiry, which without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. * * * 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawul totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125, 4 Cranch, and page 570, 2 L. Ed. That declaration has always been adhered to by the federal courts and followed generally by all courts where

jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our state constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing Court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It can not go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the Circuit Court had no jurisdiction to review the evidence, many of which are cases decided by this Court. We have taken time to examine each of such cases and are unable to discover that they

furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.), 96 Fed. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus: "The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*." The concluding language of the opinion is as follows:

"It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this Court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this Court that upon *habeas corpus* proceedings only jurisdictional errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, can not be considered, because, the court having jurisdiction of the subject matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdic-

tional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *In re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright vs. Wright*, 74 Wis. 439, 43 N. W. 145; *In re Graham*, 76 Wis. 366, 44 N. W. 1105; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re Meggett*, 105 Wis. 291, 81 N. W. 419; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Eckart*, 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* can not reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error.

State vs. Whitford, 54 Wis. 150, 11 N. W. 424; *State vs. Dodge Co.*, 56 Wis. 79, 13 N. W. 680; *State vs. Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see Church, Hab. Corp., §§ 237-247; *People vs. Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Hardigan*, 57 Vt. 100; *In re Simon* (Sup.) 13 N. Y. Supp. 399; *State vs. Hayden*, 35 Minn. 283, 28 N. W. 659; *People vs. New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones vs. Darnall*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with text books in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State vs. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common law rule it has been repeatedly held, in states having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far as necessary to determine whether the magistrate acted upon competent evi-

dence tending to establish the facts and also the introduction of new evidence on issue joined as provided. *People vs. New York Catholic Protectory, supra; People vs. Richardson*, 18 How. Prac. 92; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *People vs. Tompkins*, 1 Parker, Cr. R. 224. In the report of *People vs. Martin, supra*, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus: "In criminal cases where an indictment has been found the court, upon *habeas corpus*, can not go behind the indictment because there are no means of ascertaining upon what it was found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on *Habeas Corpus*, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear, though, that chapter 147, Rev. St. 1898, was intended to cover the entire field of practice in *habeas corpus* suits so far as relates to original proceedings. The scope of section 3425, *Id.*, is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to the attention of the Court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his answer to the return, where such answer contains allegations rendering such proof competent. Sections 3427, *Id.*, precludes examination into the proceedings upon which the determination of the court was had in committing

the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, *Id.*, refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the Court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it,—but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the Circuit Court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence given before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, can not be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error Melvin A. Hoyt, that "Where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of

conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at section 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the Court as applicable to the facts of this case. Where an act is of itself an offense, as that of adultery, it can not be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursus necessarius*—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursus necessarius* in that at least two persons are necessary to a combination or agreement. But there is also the element of *concursus facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of it; in the other, concert, itself an offense, is a mere aid to the act which

is the ultimate purpose thereof—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon vs. Com., 14 Pa. St. 226, and *Miles vs. State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to the Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon vs. Com.*, where an act is an integral offense and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons willfully and maliciously to injure the Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, *i. e.*, of injuring the business of the Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to willfully and maliciously injure the Journal Company in its business. Counsel admits that there

is a dearth of authority to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S. vs. Stevens*, (D. C.) 44 Fed. 132; *U. S. vs. Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *Reg. vs. Boulton*, 12 Cox, Cr. Cas. 87; *U. S. vs. Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *U. S. vs. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State vs. Sprague*, 4 R. I. 257; *Ochs vs. People*, 124 Ill. 399, 426, 16 N. E. 662; *Reg. vs. Whitchurch*, 24 L. R. Q. B. 420; *U. S. vs. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg. vs. Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg. vs. Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S. vs. Bayer* the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main, "Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been com-

mitted is no legal bar to a prosecution for the conspiracy. In *Ochs vs. People, supra*, it was said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that section 4466a, Rev. St. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the Circuit Court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, *i. e.*, that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named—which satisfied the requisites of the statute to that extent—concert together with intent maliciously to injure the Journal Company and the other persons named, in their trade and business, sufficiently charged

the doing of those acts made an offense by the statute. That such general language substantially follows section 4466a, and that such section is the only statute making a conspiracy without an overt act a criminal offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecessary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense—not an unlawful conspiracy to injure, generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on supposed

insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination, the evidence, for that purpose, was ample to give the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that, turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates twenty-five per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate. Now it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The

malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a *wrongful* act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement by reasonable inference, the independent purpose to *harm* the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any benefit that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the rea-

sonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper were so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the re-argument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person acting by himself or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of

impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations—with such success in fact that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies.

Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S. vs. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *U. S. vs. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Gibbs vs. McNeeley* (C. C.), 102 Fed. 594; *Nester vs. Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247; *People vs. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *Jackson vs. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *People vs. Nussbaum* (Sup.), 66 N. Y. Supp. 129; *Leonard vs. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *People vs. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Ford vs. Association*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus: "It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully ques-

tioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied. State & Federal Control, Sec. 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens vs. Reilly* (decided Jan. 8, 1901), 109 Wis. 464, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases

where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be re-written. The following are the cases referred to: *Mogul S. S. Co. vs. McGregor*, 23 Q. B. Div. 598, decided in House of Lords and reported in (1892) App. Cas. 25; and *Huttley vs. Simmons* (1898), 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fay, L. J., said: "I lay out of consideration in this case competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The Mogul S. S. Co. Case, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combi-

nation, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the Mogul S. S. Co.'s Case on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory vs. Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English courts for two centuries prior to the Mogul S. S. Co. Case, we are supported by the lord chancellor in *Allen vs. Flood*, (1898) App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the Mogul S. S. Co. Case, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory vs. Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford vs. Brandon*, 2 Camp, 358, a similar case; or *Garret vs. Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen vs. Flood*, had never been questioned. Those simple cases

contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen vs. Flood* was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the Mogul S. S. Co.'s Case, and said that, "If the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen vs. Flood*, it was but a step to reach *Huttley vs. Simmons, supra*. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the Mogul S. S. Co. Case and that of *Allen vs. Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley vs. Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time,

been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley vs. Simmons:* "If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. * * * But, notwithstanding the decision in *Huttley vs. Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." Section 503. In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conslucion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This Court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley vs. Simmons*, would be to overrule those cases. *Bratt vs. Swift*, 99 Wis. 579, 75 N. W. 411; *Association vs. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127; *Gatzow vs. Buening*, 106 Wis. 1, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations: 1 Hawk, P. C. 446, § 2; *State vs. Stewart*, 59 Vt. 273, 9 Atl. 559; *Carew vs. Rutherford*, 106 Mass. 14; *Ertz vs. Exchange Co.* (Minn.), 81 N. W. 737; *State vs. Buchanan*, 5 Har. & J. 317; *Com. vs. Waterman*, 122 Mass. 57; *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co.* (C. C.), 60 Fed. 803; *State vs. Norton*, 23 N. J. Law, 33; *State vs. Glidden*,

55 Conn. 46, 8 Atl. 890; *Sherry vs. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith vs. People*, 25 Ill. 17; *In re Crump*, 84 Va. 927, 6 S. E. 620; *Doremus vs. Hennessy*, 176 Ill. 608, 52 N. E. 924.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley vs. Simmons*, appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the Mogul S. S. Co. Case. So far as then developed they were presented in *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co.*, *supra*, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com. vs. Carlisle, Brightly, N. P.*, 36, the following: "It will therefore be perceived that the

motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that *De minimis non curat lex* applies; but when he unites others with him to maliciously injure the business of another for the mere

gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co., supra*, the union of individual forces by agreement to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury" as used in the statute, is synonymous with that term at common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more

to wrongfully accomplish harm to another in the line of tho things mentioned in the statute. It is in harmony with the do trine, so definitely stated by Baron Brammel in *Reg. vs. Druit* 10 Cox. Cr. Cas. 593, that it has often been quoted by courts a textwriters and nowhere rejected: "The liberty of a man's mi and will to say how he shall bestow himself and his means, h talents and his industry, is as much a subject of the law's pr tection as that of his body;" and "if any set of men agree amo themselves to coerce that liberty of mind and thought by co pulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendan in error are severally reversed and the cause is remanded wi directions to remand them to the sheriff of Milwaukee coun

DODGE, J., took no part.

From *Hawarden vs. Youghiogheny & Lehigh Coal Co.*, 1 Wis., 545, op. 549.

WINSLOW, J. The first count of the complaint is claimed state a cause of action at law to recover damages resulting fr an unlawful conspiracy, and the second count a cause of acti in equity on behalf of a class to restrain the further executi of the conspiracy, and both counts are challenged by demur for insufficiency of facts.

1. The gist of the first count is that the plaintiff was a tail coal dealer in the city of Superior; that the defendan "the wholesalers," own practically all the coal docks at Superi and Duluth, and that a retailer cannot carry on his business Superior unless he can buy of the wholesalers freely and wi out discrimination; that the wholesalers entered into a com nation with the defendant retailers by which it was agreed th the wholesalers should sell coal to the defendant retailers, a to none others, for the purpose, among others, of forcing out the retail trade all retailers not in the combination, and amo others the plaintiff; that such agreement or conspiracy has be

successful, and as a result thereof the plaintiff's business has been destroyed, to his damage. Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making greater gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State ex rel. Durner vs. Huegin*, 110 Wis. 189, it was in effect repudiated. It is true that that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice Marshall it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury

to such other is actionable. "Where the act is lawful for a individual, it can be the subject of conspiracy, when done i concert, only where there is a direct intention that injury sha result from it."

These principles are decisive as to the first count in th complaint. The allegation is distinct and clear that one of t purposes and objects of this agreement was to drive the plainti out of business. This was an ulterior and unlawful purpos and constitutes malice in contemplation of law. Therefor under the allegations of the complaint, it is clear that the co bination here formed was formed for the malicious purpose doing an injury to another, and that such injury has resulte and hence that a cause of action at law for damages is stated.

The conclusion reached renders it unnecessary to consid the effect of Sec. 1747e, Stats. 1898, with regard to combinatio in restraint of trade or commerce.

2. In the second count the plaintiff attempts on behalf of class of persons, namely, the retailers who were excluded fro the combination, to obtain equitable relief by way of a perpetu injunction restraining the continuance of the operations of t conspiracy. That courts of equity have jurisdiction to restra such conspiracies when irreparable injury will result and leg remedies will prove inadequate or a multiplicity of suits necessary, seems to be well settled. *Beck vs. Railway T. Union,* 118 Mich. 497. That the conspiracy may be direct against a considerable number of persons as well as against on cannot be doubted. We have, therefore, before us an unlawf conspiracy directed against a large number of persons, whi has already resulted in driving out of business a considerab number of such persons, and which the defendants threaten continue indefinitely against the whole class.

Plaintiff claims that this situation brings the case with that provision of the statute contained in Sec. 2604, Stats. 189 which declares, "When the question is one of common or gener interest of many persons, * * * one or more may sue f the benefit of the whole." The question as to the legality of th conspiracy is certainly one of common and general interest

all persons against whom it was directed and is being enforced. The complaint alleges that there are many of such persons, and we are unable to perceive any fault in the plaintiff's contention. It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of *George vs. Benjamin*, 100 Wis. 622, and *Hodges vs. Nalty*, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed "very numerous" is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons. These conditions are satisfied here, and we conclude that the second count states a good cause of action in equity by the plaintiff on behalf of himself and a class composed of all other retail coal dealers in Superior similarly situated.

Thus there are two good causes of action stated in the complaint, one at law and one in equity, both arising out of the same transaction. But here arises for consideration the general demurrer to the whole complaint on the ground that two causes of action have been improperly united. Though this demurrer was not specifically referred to in the order appealed from, for the reason that the court held that but one good cause of action was stated, still it was, in effect, overruled as a necessary result of that order.

The statute provides that causes of action, in order to be united in one complaint, "must affect all the parties to the action." Stats. 1898, Sec. 2647. It is clear that this limitation would be violated if the two causes of action in this complaint are allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action, whatever it be. But the second cause of action is a cause of action in favor of a large number of persons, constituting a class represented by the plaintiff. Potentially all of the class

are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined. Pomeroy, Code Remedies (3d Ed.), § 502.

These considerations are conclusive to the effect that the general demurrer to the whole complaint on the ground of improper joinder should have been sustained.

BY THE COURT:—That part of the order overruling the demurrer to the first count of the complaint is affirmed, and that part sustaining the demurrer to the second count is reversed, and the action is remanded with directions to overrule the demurrer to the second count and sustain the separate demurrer to the entire complaint, and for further proceedings according to law."

s plain-
hus the
reas the
ff. The
f action
acity in
y, Code

hat the
d of in-

the de-
nd that
eversed,
the de-
emurrer
cording

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1904.

Nos. 3 and 4.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

REPLY BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

Counsel for the State begin their brief with a concession of the correctness of the statement of Judge Cooley relative to the right to refuse contract relations, but qualify this concession by averring that the law as thus stated relates to "individual and independent action." This idea runs all through the brief, cropping out in various forms of statement, in nearly every chapter. Can any such limitation be put upon the rule in question? Not every legal right is a constitutional right, but this right to refuse to contract is a constitutional right (*State vs. Julow, &c.*, p. 99 et seq. our brief) essential to the liberty to contract; and quite beyond this, also essential to the exercise of the right of competition. If we look into the reason of this

rule admitted by counsel for the State, we discover at once that the rule is based upon considerations which show his proposed limitation of the rule to "individual and independent action" to be unsound. The reason for the rule in considering the liberty of contract is that it would be subversive of such liberty if those to whom a contract was proposed could only refuse when their motives were proper or when the state approved their refusal, or, what is the same thing, could only annex such conditions to such refusal as the authorities thought beneficial to the person refusing.

The reason for the rule in considering the right to engage in trade competition is that the latter right is essential to liberty—not alone liberty to make contract, but to pursue a lawful avocation and struggle for one's living. And this competition could not be exercised if the motives accompanying the exercise of any act of competition which involved a refusal to contract could be inquired into. Now both the above things, contract and competition, can only be carried on by consultation, combination and acts which are at some point of the transaction, if not at all points, connected with the co-operation and combination of other persons interested in the subject matter of the contract or interested in the competition. Consequently the limitation proposed by the State to be within its police power is a limitation which destroys the liberty of contract and the right to competition. This might be destroyed under the police power if it came within the acts inimical to public health, morals or welfare. We have cited the authorities to show that such transactions do not come within the limits of the police powers, because they do not affect the public injuriously, etc.

II.

As we understand Chapter I, pp. 5 to 14, of the brief for the State (and we have faithfully tried to understand it), that chapter is intended to support the proposition that if the state statute properly interpreted be not unconstitutional as depriving one of liberty or property, and the decision of the state court

lays down no unconstitutional general rule governing all cases, the plaintiff in error could not complain to this court, even if by erroneous determination of fact, or erroneous decision of law in the instant case, they were deprived of liberty or property without due process of law. This, we submit, is manifestly incorrect and contrary to the rules of this Court.

Chicago, &c., Ry. Co. vs. Chicago, 166 U. S. 226, citing and explaining

Scott vs. McNeal, 154 U. S. 34, and other cases.

III.

The whole argument on the part of the State contained in (Chapter II, pp. 14 to 27), seems to us to rest on the premise that there was alleged in the information (Printed Record, pp. 16, 17, 18) a combination for the purpose of "regulating and controlling prices." If this premise is not correct this part of the argument for the State falls and the cases cited by the State in this chapter are not apposite. The information tells us of the business in which each person was engaged, that the Journal Company raised its rates about twenty-five per centum over *its former rates,* and the accused thereupon, without prescribing any prices that any or either of them should charge to the general public, without any agreement of uniformity of prices as between themselves and without fixing any price for either of the persons agreeing with reference to his base upon which to compute a twenty-five per centum advance, did agree that they would refuse to contract with those who paid or agreed to pay the Journal Company its raised rates except upon condition that such person would patronize all three papers of the accused and pay to each for such advertisement an advance of twenty-five per centum over *its former rates.* If such person withdrew from the Journal and went over to the accused, or merely refused to pay the Journal its advanced rates, which we may assume is the same thing, then he could come in among the other patrons of either or all of the accused newspapers. If this can be considered "regulating and controlling prices," it must

be in the same sense that all competition regulates and controls prices. Because the prices it tends to control are not the prices of the parties to the compact, but the prices of their competitors. But in every decision condemning contracts for the purpose of "regulating and controlling prices" there will be found by express language or necessary implication this qualification, namely: "except by competition." So that we must inquire whether there is in this situation any element of an agreement to regulate and control prices otherwise than by competition. It would be indeed strange if the State in its police power claimed and had the right to prohibit such contracts above named on the ground that they were subversive of competition, and at the same time claimed and had the right to prohibit contracts which were in themselves the necessary agencies of competition. Somewhat similar use was attempted to be made of the anti-trust law in *Whitwell vs. Continental Tobacco Co.*, 125 Fed. Rep. 454, but the court of appeals showed that the law could not be so perverted. And we submit further that the Northern Securities Company case, 24 Sup. Ct. Rep. 436; 193 U. S. 197, so liberally quoted from on pp. 19 to 23 of the brief for the State, is against the contention made in that brief instead of in favor of, so far as that case has any application at all. That is, it is against the contention of the State because it speaks for the paramount importance of and upholds the right of competition. Observe that on page 23 of the brief for the State is printed in large capitals an excerpt from this opinion conceding that the states possess authority to guard against combinations that repress individual enterprise and interfere with the operation of the natural laws of competition. We do not exactly understand why this is quoted or why it was thought entitled in this case at bar to the distinction of capitals. It is no doubt correct that the states possess such power. But what are the natural laws of competition? Not like the laws of gravitation or inertia, but economic laws based on human desires and on nothing else. Are they not fostered by that which gives freedom to activity and endeavor prompted by these desires, and hindered by the basic position of the counsel for the

State in his brief? That is, that no two or more persons shall co-operate in competition.

IV.

An examination of the brief of counsel for the State discloses (Chapters V and VI) that it has great doubts of our seriousness and (pp. 2, 3, 7, 8, 9, 10, 16, 17, 20, 21, 22, 23, 24, 31, 32, 34, 35, 36) great faith in quotations. Inaccurate as our use of language may be in portions of our brief, we believe there can be nothing found in it quite so bad as that of the "elaborate" note from which the State quotes at pp. 2 and 3 of its brief. That note affirms that the weight of authority supports the proposition (1) that one *who suffers damage* from an act not constituting a *legal injury* cannot maintain an action against him who does such act with malice and bad motive. (2) But if one with the sole and malicious purpose of *injuring* another and without any benefit, interest or *pleasure* (other than he derives, etc.) to himself or to others, commits *"an act which if done in good faith would be justifiable,"* he is liable in an action, etc. This is indeed "elaborate." What does "injuring" mean? Is proposition (2) to be taken to contradict or to engraft an exception upon proposition (1)? What kind of an act is "an act which if done in good faith would be justifiable"? Does (2) refer to the acts "not constituting a legal injury" in proposition (1)?

Had we first caused our brief to be printed as an elaborate note to some decision and then presented it in quotations, the State would have, no doubt, more confidence in our seriousness.

V.

The criticism on pp. 12 and 13 of the brief for the State upon the plea and the word "injuring" therein, we submit is not well taken, because the plea must be construed with reference to the information. The only "injury" claimed in this information is that of depriving the Journal Company of customers. Consequently this is the only "injury" admitted by the plea.

VI.

The quotation from *Dels vs. Winfree* on brief for the State (p. 37), must be limited to "influencing others" who are not themselves co-operating in competition.

VII.

The positions of the State are in many respects inconsistent and contradictory, as we will point out in the oral argument, and are wholly in negation of the proposition from *State vs. Dalton*, 22 R. I. 77, cited and approved in *State vs. Dodge*, 56 Atl. Rep. 984 op. viz:

"It is not enough to bring a given business within the prohibitory power of the legislature that it is so conducted as to seriously interfere with or even destroy the business of others."

This decision covers the police power of the State. Can this highest court deny it without opening the floodgates of hostile and socialistic legislation throughout the union?

Respectfully,

GEO. D. VAN DYKE,
W. H. TIMLIN.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1902.

Nos. 298 and 297.

ALBERT HUEGIN,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

MAY IT PLEASE THE COURT:

A writ of error was sued out of this Court by each of the plaintiffs in error above named, directed to the Supreme Court of the State of Wisconsin, to review the final judgment of that Court affirming the judgment of the Municipal Court of Milwaukee County, Wisconsin, which adjudged the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt guilty of having committed a misdemeanor, as charged in the information, to-wit: conspiracy to injure another in his trade or business under Section 4466a of the

Statutes of Wisconsin of 1898, and sentenced each of them to pay a fine with costs, and in default of payment to be committed to the House of Correction of Milwaukee County at hard labor until such fine and costs were paid, not, however, to exceed thirty days.

STATEMENT.

I. Section 4466a, Statutes of Wisconsin of 1898, provided as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the purpose "of wilfully or maliciously *injuring another in his reputation, "trade, business or profession by any means whatever,* or for the "purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

II. October 1st, 1901, an information (printed record, p. 16) was filed in the Municipal Court of Milwaukee County, Wisconsin, which attempted to set up an offense under the above statute. Reduced to its simplest form, the information, in substance, charged that the accused, viz.: the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt, each of whom was the business manager of a daily newspaper published in the City of Milwaukee, in said county, respectively named the Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, for the purpose and with the intent of wilfully, maliciously and unlawfully injuring the Journal Company (which was a corporation engaged in publishing another daily newspaper in said city, viz.: The Milwaukee Journal) *in its trade and business,* and also Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum (who were stockholders and officers of The Journal

Company), and each of them, in their trade and business; had combined together and agreed that if any person advertising or proposing to advertise in The Milwaukee Journal should pay The Journal Company an increased rate then recently established or fixed by it, then and in that case any such person should not be permitted to advertise in any of the other three newspapers, to-wit: The Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, unless such person should advertise in each of said three papers and should pay to each of them an increase equal to the said recent increase of the Journal's rates over the rates theretofore charged by said three papers respectively; but that in case any person should refuse to pay to The Journal Company its increased rate, then such person should be at liberty to advertise in either or all of the other three papers at the rates which had theretofore been charged by them respectively; and further charged, in substance, that in pursuance of said agreement advertisers had been notified of said agreement and had been induced to withdraw their advertisements from The Milwaukee Journal, and other advertisers had been prevented from advertising therein, all to the injury of The Journal Company.

III. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, each interposed a separate special plea in bar (printed record, p. 19.) These pleas are exactly alike and are in the nature of pleas in confession and avoidance, a precedent for which is found in *Rex vs. Kilderby,* 1 Saunders, 308, cited 1 Chitty Crim. Law, 472.

They admit the agreement and acts in pursuance thereof, as alleged in the information, and while they assert that the intent was to injure The Journal Company, they do not admit that their acts were either malicious or unlawful, but on the contrary they allege "that those acts, intentions, agreements and combinations were done, harbored, made and entered into in *trade competition,* and that such acts, intentions, agreements

and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," and as free men and citizens of the United States and of the State of Wisconsin and as competitors in business with The Journal Company they claimed immunity therefor under Article XIV of the Constitution of the United States, notwithstanding any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary.

IV. The prosecution moved to strike out the special pleas above mentioned, which motions were denied, and thereupon asked that said motions might stand and be considered as demurrers to such special pleas, and the accused consenting thereto it was so ordered. After a hearing the demurrers to said special pleas were sustained, and the accused having elected to stand on their said pleas, were found guilty thereon, as charged in the information, and sentenced as above mentioned.

V. Upon writ of error the Supreme Court of the State of Wisconsin affirmed this judgment (printed record, p. 52), and to review the latter judgment this writ of error was sued out.

VI. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, have each filed assignments of error upon which they rely to reverse said judgment. They are alike, and in substance are as follows (printed record, p. 9.):

(1) The Court erred in sustaining the demurrers interposed by the State of Wisconsin to the pleas filed by the accused, and by holding and deciding that the facts stated in said pleas were not sufficient to constitute a defense to the matters and things charged in the information.

(2) The Court erred in determining that the pleas filed by the accused were not a sufficient justification and defense under

the XIVth amendment of the Constitution of the United States.

(3) The Court erred in sustaining the demurrers of the State of Wisconsin to the pleas of the accused and in not determining upon said pleas that the information was insufficient in law.

(4) The Court erred in adjudging the accused guilty on the record before it, viz.: said information and pleas, and sentencing them to fine and imprisonment and affirming the judgment of the trial court in that regard, for the reason that said record shows that said sentence and conviction were in violation of the rights of said accused under the XIVth amendment of the Constitution of the United States, in that it deprived them of the use of their property without due process of law, and in that it deprived them of the liberty guaranteed them by said XIVth amendment to make contracts not inimical to public health, welfare or morals, and in that it deprived the said accused of their liberty and abridged the privileges and immunities of said accused as citizens of the United States, and denied to them the equal protection of the law.

VII. Melvin A. Hoyt, above mentioned, demurred to the information; his demurrer was overruled, and standing on his demurrer he was found guilty, as charged in the information, and he was sentenced in the same manner. Upon writ of error the Supreme Court of Wisconsin affirmed this judgment, and to review this latter judgment he has sued out his writ of error.

ARGUMENT.

The precise question presented is this: Does Section 4466a, Wisconsin statutes of 1898, as interpreted and applied by the Wisconsin Supreme Court, deprive the accused of their liberty or property in violation of Section 1 of the fourteenth amendment of the Constitution of the United States?

It is settled that the constitutionality of a criminal statute

is to be tested not only by what has been declared criminal under it, but by what may be so declared; for a criminal statute cannot be used as a drag net to ensnare the guilty and innocent, leaving the latter to extricate themselves as they can.

Trade Mark Cases, 100 U. S., 82.

Montana Co. vs. St. Louis Co., 152 U. S., 170 op., citing *Stuart vs. Palmer,* 74 N. Y., 183.

In re Ah Jow, 29 Fed. Rep., 181.

If the Supreme Court of Wisconsin had limited the word "injuring" in this penal statute to mean the infraction of some legal right (11 *Am.* & *Eng. Encyc. of Law,* 1st ed., bot. p. 1, and cases), or had excepted acts of co-operation in trade competition from the purview of the statute in the decision now before this Court on writ of error, different questions might arise. But that Court did not do so. The question of the constitutionality of Section 4466a hereinbefore quoted must be determined in this Court upon the construction given to that statute by the Supreme Court of Wisconsin (*Machine Co. vs. Gage,* 100 U. S., 676), namely: that the statute is meant to prohibit intentional joint action of any kind, which joint action is intended to cause a loss of trade to another. This includes within the purview of the statute co-operation in trade competition. Thus construed we submit the statute is unconstitutional.

It is not difficult to instance cases of purely innocent acts which under this statute, as interpreted and applied, would be deemed criminal. A partnership agreement for the purpose of engaging in a trade which would invade the business field of another and injure him in his business by reducing the number of his customers would be an instance. Other instances of agreements made in trade competition which would fall within the condemnation of the statute are given in the cases following:

Steamship Co. vs. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 598; 1892 App. Cas., 35.

West Va. T. Co. vs. Standard Oil Co., 54 Cent. L. J., 246, and note; same case, 40 S. E. Rep., 591.

The foregoing case contains a very thorough discussion of the authorities:

Vegelahn vs. Guntner, 167 Mass., 92, and cases.
Guethler vs. Altman, 60 N. E. R., 355 (Ind.).

It is sufficient for the purposes of this case to confine our attention to the facts stated in the special pleas of the accused, the truth of which are admitted by the demurrers. They are, in substance, as follows:

A newspaper, The Milwaukee Journal, raised its advertising rate about 25 per cent. above its then existing rates. Three other newspapers, competitors with The Milwaukee Journal, refused to raise their advertising rates, and met their competitor's raise of rates by agreeing together that all advertisers who paid or agreed to pay The Milwaukee Journal its increased rates should have their advertisements accepted by the other three newspapers, in case they desired to advertise in any of the other three newspapers, only upon condition that they advertised in all the other three papers and paid to each a corresponding advance in rates. It will be observed that this agreement concerned property impressed by no public use; that it concerned only what private persons should do or refuse to do with their own private property; that no question of public health, morals or welfare was affected thereby; that it was done in the exercise of trade competition; that its object and purpose was to keep prices down; that it is impersonal in its aim and directed only against a policy; that it was done to injure a competitor by winning away its customers only in case it persisted in its attempt to raise prices. This result would naturally follow, for if it persisted in advancing its rates, advertisers desiring to advertise in one newspaper only could select any one of the three newspaers of the accused and avoid paying the advanced rate; advertisers desiring two newspapers could select two of the three newspapers of the accused paying the old rates instead of selecting The Milwaukee Journal and one of the newspapers of the accused, and so saving the advance of 25 per cent. on the rates of both; advertisers desiring to advertise in

three newspapers could select the three newspapers of the accused instead of The Milwaukee Journal and two of the newspapers of the accused and so save the advance of 25 per cent. in the rates of each; all advertisers desiring to advertise in four newspapers could of course use all four by paying each of the three newspapers of the accused the same rates as they paid The Milwaukee Journal.

It will also be observed that as the advertising trade is necessarily a limited one, the injury sustained by The Journal Company by a loss of customers was an advantage to the newspapers of the accused in so far as they could attract and secure such advertisers. And while the intent of the accused was to injure The Journal Company in the sense of trade competiton, the intent was also to benefit their own newspapers. The pleas admitted by the demurrers negative any malice or unlawful intent by showing the exercise of a legal right by accused; for malice or criminal intent will not be presumed where the act is consistent with legality.

West Va. T. Co. vs. Standard Oil Co., supra.

In this case the accused were adjudged guilty of an offence under the Wisconsin statute mentioned and sentence of fine or imprisonment imposed notwithstanding their claim of immunity for those acts on constitutional ground.

Aikens vs. State, 89 N. W. Rep., 1135.
Huegin vs. State, ibid.
State ex rel. Durner vs. Huegin, 110 Wis., 189.

In reading the opinion of the Supreme Court of Wisconsin in the *habeas corpus* proceedings (110 Wis., 189) this distinction should be borne in mind, namely: in the *habeas corpus* proceedings, in which the sufficiency of the complaint upon which the accused were originally brought before the examining magistrate was considered, the complaint, although it set out the facts, alleged generally a malicious and unlawful intent to injure, and did not show expressly, but left it to inference from the facts set forth that the acts complained of were done in

trade competition while the pleas, the truth of which is admitted by the demurrers, allege that the acts were done in trade competition and negative any unlawful intent.

The pleas therefore raise the additional question, namely: whether or not even if this statute is valid it makes criminal, acts of co-operation in trade competition without any intent to inflict injury other than the usual loss to a rival caused by successful competition.

If the words of the statute (Section 4466a, Wis. Statutes 1898) "Injuring another by any means whatever," as interpreted by the Supreme Court of Wisconsin, include within the term "injuring" a loss to business by trade competition and covers every act, whether lawful or unlawful in itself, which may prejudice another in his business as illustrated by the facts stated in the pleas in this case, the statute and the decisions of the Supreme Court sustaining it and so applying it deprives the citizen of the "liberty" of pursuing a lawful private calling and of the right of making contracts in respect thereto not injurious to the public welfare.

Niagara F. Ins. Co. vs. Cornell, 110 Fed., 816, 824.

Allgeyer vs. Louisiana, 165 U. S., 578; 17 Sup. Ct. Rep., 427.

Frisbie vs. U. S., 157 U. S., 160, 165; 15 Sup. Ct., 586.

Insurance Co. vs Cornell, 110 Fed., 816, 824 op. and cases cited.

Neither the statute (Sec. 4466a R. S. of Wis.) nor the decision sustaining it can be held as law, if subversive of these rights of the citizen, because the fourteenth section of the Federal Constitution applies to all agencies of state power, legislative, judicial and executive.

Chicago &c. R. R. Co. vs. Chicago, 166 U. S., 226; 17 Sup. Ct. R., 581.

Scott vs. McNeal, 154 U. S., 34; 14 Sup. Ct. R., 1108.

No question of public health, safety or morals is subserved by the statute, Section 4466a, nor by the decisions of the Wiscon-

sin Supreme Court in enforcing it under the facts stated in the pleas, consequently there can be no support for either under the police power of the state.

Lawton vs. Steele, 152 U. S., 133.

State vs. Dalton, 48 L. R. A., 775; same case, 22 R. I., 77.

State vs. Loomis, 21 L. R. A., 789 and note; same case, 115 Mo., 307.

It cannot be said that a statute has relation to the police power of the state when it is apparent from the statute that it has not, or when the statute, as interpreted by the State Court, goes away beyond the police power.

State vs. Santee, 53 L. R. A., 763, and cases in note; same case, 111 Iowa, 1.

Brannon's Fourteenth Amendment, pp. 480-491.

If association or combination for the purpose of trade competition were something not vital in trade and commerce, if the suppression of competitive combination did not strike at the life of economic association, and if a certain form of combination for competitive purposes were something which might be used as a cover for unlawful practices, the state might, under its police power, prohibit such form of combination. The prohibition in such case could be sustained under the rule of *Booth vs. The People,* 22 Sup. Ct. Rep., 425. But the state could not under the police power prohibit all association or joint action causing loss to another in business any more than it could prohibit all contracts in order to reach the evil mentioned in *Booth vs. The People, supra.* We submit the statute of Wisconsin hereinbefore quoted with the meaning given to it by the Supreme Court of Wisconsin in the decisions here for review, does prohibit all association for competitive purposes and consequently is the very kind of law which *Booth vs. The People, supra,* distinguishes as invalid and as infringement of rights secured by fundamental law. The statute as construed by the Court below prohibits all association for competitive purposes

because all such association is wilful and all such association is for the purpose of injuring another in his trade within this loose meaning of the word "injuring," and all such association is malicious if malice may be inferred from the act of offering inducements to win away customers or from the exercise of acts of competition either singly or by groups.

"Only through the principle of competition has political "economy any pretentions to the character of a science. A dic- "tum that has compressed into a sentence the economic systems "of Ricardo, James Mill, Senior, and McCulloch."

Modern Distributive Process, Clark & Giddings, 1888, p. 18.

In a book by Prof. C. H. Cooley of Ann Arbor, published also in the Proceedings of American Economic Association of 1899, pp. 78, 173, the author at page 109 states this evident truth:

"There is no clear dividing line between individual and "group competition. In a certain sense it may be said that "there is no individual competition since the competing per- "son always draws aid and comfort of one sort or another from "other persons. So far as man is social and not merely ani- "mal he is the center and in a manner the product of a complex "web of relations and influence from which he can in no way "be separated unless by death. By group, however, is ordinar- "ily intended in this connection a definite association with "distinct purposes and organization. One of the chief pur- "poses of the creation of such definite groups is to compete "more effectually."

And again, *ibid.*, p. 107:

"True freedom, healthy organization and the highest type "of competition inevitably go together. They are indeed va- "rious aspects of the same thing. Freedom is possible only "through open competition and through an organization that "promotes the highest development of each individual; the best "organization is not only the outcome of rational freedom and "just competition, but is also a means of securing these."

It requires no special learning as an economist to appreciate the truth that association, combination and joint action are necessary parts of the competitive system. Take the case at bar. The complainants themselves are associated together to acquire trade, win away customers and injure other competitors in their trade in all modes not involving the violation of property rights. They do this intentionally and for the purpose of injuring other competitors within this loose or popular meaning of the word "injuring." It is only by their joint action and endeavor that they are able to offer their advertising advantages to the public and to raise the rates. The information shows by fair inference, that the prosecutor, the Journal Company, is as guilty under this statute so construed as the accused. For did not its managers combine, associate and agree to raise its prices to the injury in their trade of those who might have to pay such increased prices? This demonstrates the absurdity of such a law. Under such a law the counsel for the accused are liable, for did they not combine, associate, etc., for the purpose of injuring another by some means whatever? This Court in consultation must associate, agree together and combine for the purpose of deciding this cause and thereby "injuring" someone in the sense of causing loss.

To re-state the foregoing argumentatively: all such association is necessarily wilful in the sense of intentional. All such association injures the other competitor in his trade by causing a loss or diminution therein. If the intention to win away trade and patronage from another is a "malicious" intention, all competition is "malicious." If such intention, being a mere intention to exercise a legal right, is not "malicious," then the plea in this case is good. But the decision below and the construction thereby given the statute in question is to the effect that the fact that the acts charged were done in the exercise of trade competition is no justification. This is the result of the latest decision to which the writ of error herein runs. In the first decision of the habeas corpus (110 Wis., 189) the State Supreme Court undertook to decide the motives of the parties in this competition and stated that the means adopted as

shown in the complaint (information) indicated that the motives of the accused were malicious because the accused could not be benefited by the means employed. This is a very patent error arising, perhaps, from lack of experience in trade competition. The winning away of customers by offering advantages is always a benefit to the trader who secures their patronage, provided the advantages offered are such that they still leave the trader a profit or a gain of some kind. But, as we said before, this distinction disappears from the decision of the State Supreme Court here for review because it is there held that the plea is insufficient conceding it to be true.

We contend that the decision in 110 Wis., *supra,* is also fundamentally wrong both in the conclusion that the accused could not be benefited by their association and in the proposition that a law could be valid which made group competition criminal if the mental state of the competitors exercising such right might be found by a Court or jury to be "malicious." "Any means whatever" includes lawful means and to hold that competition can only be exercised when not "malicious" is to prohibit competition.

We concede that this Court will not declare the statute in question with the construction given it by the Wisconsin Supreme Court contrary to the federal constitution unless this Court can say that the statute with such construction has no real or substantial relation to the public health, safety or morals, but is a clear, unmistakable infringement of the rights secured by fundamental law. Our contention is, however, that this statute and the decision of the Supreme Court of Wisconsin in the case at bar cannot be upheld under the broadest scope that can be given to the police power unless this Court is prepared to go to the extent of holding that all combination or co-operation of individuals, whether for competitive purposes or not, which is intended to affect any other established business by causing a loss of trade may be punished as a misdemeanor by the State legislature. This, however, asserts the power of the state to suppress co-operative competition and

combinations for trade purposes, such as partnership, and it also assumes that a power exists in the state to declare that offering advantages to win away trade or custom from another in the way of competition, when this is done by the co-operation of two or more, constitutes an "injury" or the infraction of a legal right of that other. What is this but declaring that all who have patronage shall retain it and no two or more shall associate for the purpose of winning it away? Such a law creates and perpetuates monopoly. It is destructive of competition because it forbids co-operative or group competition. It makes all trade and commerce criminal because it penalizes those acts which are indispensable to carrying on trade and commerce. As applied to trade combinations it practically deprives the citizen of the liberty of pursuing a lawful calling and making contracts in respect thereto. If it be asserted that association, combination and joint action may be employed for unlawful purposes detrimental to public weal and that therefore the legislature may suppress all such, we submit that this position is unsound. Writing may be used for forgery, printing for libel, engraving for counterfeiting, chemistry to aid in felonious poisoning, meetings of the people for treasonable plots, contracts as a cover for gambling, etc., etc., but it could not be claimed that the legislature might prohibit all writing, all printing, all engraving, all meetings of the people or all contracts. Competition may be carried on to the extent of ruining a rival by driving him out of trade and after this the survivors might raise the prices, but this would not justify the suppression of competition. Besides, in the case at bar the group competition is directed solely against a policy of the complainant and not against the complainant personally, it reaches only the raise of prices and ends when the raise of prices by the complainant ends. It takes advantage of that raise of prices by offering to the public inducements to trade with the accused instead of with the complainant at its higher prices. The limits of the police power must be determined in each case as the question arises as was said by this Court in *Allgeyer vs. Louisiana, supra.* We submit that the case at bar presents upon the

plea offered by the accused the question whether or not it is within the police power of a state to penalize all association for competitive purposes if the object of such association is to injure another in his trade by attracting and drawing off his customers.

When this case was before the Supreme Court of Wisconsin upon habeas corpus it presented a different question which may be stated as follows: Can the state in the exercise of its police power prohibit such association for competitive purposes whereby it is intended to injure another in his trade in all cases where it may be found that such competition is, as a matter of fact, malicious? To this, that Court returned an affirmative answer.

When this case was before the Supreme Court of Wisconsin the second time, the question presented by the plea was: Is it a justification that the combination was entered into and the acts charged were done by the accused in the exercise of trade competition.

To this that Court returned a negative answer.

Respectfully,

GEO. D. VAN DYKE,

Counsel for Plaintiff in Error, Albert Huegin.

W. H. TIMLIN,

Counsel for Plaintiff in Error, A. J. Aikens.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Nos. 296 and 297.

Office Supreme Court U. S.
FILED
APR 21 1903
JAMES H. McKENNEY,
Clerk.

ALBERT HUEGIN,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

ANDREW J. AIKEN,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

JAMES G. FLANDERS, of Counsel,

For Defendant in Error, The State of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Nos. 298 and 297.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ANDREW J. AIKEN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

May it Please the Court:

The statute, the validity of which is called in question on these writs of error, is Sec. 4466a Wisconsin Statutes, 1898, as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur- "pose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or "for the purpose of maliciously compelling another to do or "perform any act against his will, or preventing or hindering "another from doing or performing any lawful act, shall be "punished by imprisonment in the county jail not more than "one year or by fine not exceeding five hundred dollars."

I.

This statute was construed by the Supreme Court of the state on habeas corpus proceedings based on the alleged insufficiency of the preliminary compliant on which plaintiffs in error were arrested.

State ex rel. Durner vs. Huegin et al., 110 Wis. 189. (Rec. 6).

The complaint there in question, it will be seen, was framed under the statute and charged plaintiffs with the offense by the statute denounced, setting forth specifically the combination, agreement and acts in pursuance thereof which it was alleged constituted the offense. The Court was called upon expressly to determine and construe the scope and meaning of the statute to determine whether the specific combination and acts charged in the complaint came within its purview, and in the course of the determination of that question the general scope and meaning of the statute with reference to the character of combinations against which it was directed were definitely determined.

The conclusion of the court thus announced as to the meaning and construction of the statute in this regard was as follows:

"Our conclusion is this: The term 'malicious injury' as "used in the stattute is synonomous with that term at the "common law. It refers to the infliction of a wrongful injury "intentionally. Such a wrong is actionable even though the "same purpose, if formed and executed by an individual, "would not in contemplation of law be considered sufficiently "serious to call successfully for legal redress. There is noth- "ing in this militating at all against the right of individuals "to combine and associate together for the purpose of pro- "moting their individual welfare in any legitimate way. It "strikes only at the assertion of a right of combining to re- "sort to the use, as a single power, of the individual abilities "and resources of two or more to wrongfully accomplish "harm to another in the line of those things mentioned in the "statute. It is in harmony with the doctrine, so definitely "stated by Baron Brammel in Reg. vs. Druitt, 10 Cox, Cr. Cas.

"593, that it has often been quoted by courts and text-writers "and nowhere rejected: 'The liberty of a man's mind and "will to say how he shall bestow himself and his means, his "talents and his industry, is as much a subject of the law's "protection as that of his body;' and 'if any set of men agree "among themselves to coerce that liberty of mind and "thought by compulsion and restraint, they are guilty of a "criminal offense.'"

Ib., pages 262, 263,

and it was held that the complaint sufficiently alleged a violation of the statute *thus construed.*

This complaint, as will appear, was merely the complaint on which the warrants were issued and the plaintiffs apprehended. The information which followed and on which they were tried and convicted, was in all material respects the same as the complaint under which the statute was thus construed. (See information, Rec. 16; also complaint, 110 Wis., 193.)

As will be seen from the record (page 7) the judgment here complained of did not give any broader or different construction to the statute from that formerly announced on the question of the sufficiency of the preliminary complaint. On the contrary, it was expressly based upon the understanding of the court that the defendants had in effect confessed the charges contained in the information and pleaded guilty to a violation of the statute as formerly construed, and that such former decision was therefore in all respects *res judicata* upon all the questions involved.

This, as set forth in the record herein, is so pointedly and explicitly stated by the Court as the grounds of the judgment complained of that for the convenience of this Court we venture to quote from the opinion and the grounds thereof as follows:

(After a statement of the preliminary facts.)

"The plaintiffs in error thereupon each in his own behalf "refused to plead over to the information, admitted all the "allegations thereof, but insisted that the acts charged do "not constitute punishable offense. Thereupon the plaintiffs

"in error were severally adjudged guilty as charged in the "information, and punishment therefor was duly imposed by "the judgment of the Court. * * *

"From the foregoing statement it appears that all the "questions raised in the Court below by plaintiffs in error "were considered and decided against them in State vs. "Aikens, State vs. Huegin, and State vs. Hoyt, 110 Wis., 189. "The trial Court followed that decision as it was bound to do. "As we understand the matter the information contains the "same charge as the one set forth in the complaint, the plain-"tiffs in error in effect pleaded guilty thereto, admitting the "doing of all the acts charged against them, and they were "thereupon duly adjudged guilty and sentenced. In that "view the judgments must be affirmed, as all questions in "regard to the matters are *res adjudicata* as before indicated." (Rec. 6, 7.)

As will be seen from the information (Rec. 16) and the complaint before referred to, it was expressly charged that the combination and agreement were entered into and the specified acts pursuant thereto done for the purpose and with the intent of *willfully and maliciously* injuring The Journal Company and the other parties named, in their trade, business and occupation.

It had been held by the Supreme Court of the State in the decision first referred to, that the natural result of the agreement and combination if carried into execution would so obviously be to injure The Journal Company, and that the possible benefits of the combination to the parties thereto were apparently so remote, that in view of the rule that persons are presumed to intend the natural and probable consequences of their acts, it could not reasonably be said that the combination was formed for any other purpose than for the purpose of wilfully and maliciously injuring The Journal Company, using the word "maliciously" in the sense of the term at common law.

State ex rel Durner vs. Huegin, supra, at pages 249, 251.

It seems to be contended here by plaintiffs in error that the allegations of their pleas "that those acts, intentions, agreements and combinations were done or made and entered into in *trade competition*, and that such acts, intentions, agree-

nents and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," properly construed were sufficient in law to negative the charge of malice contained in the information, and which the state Supreme Court had held as before stated was a necessary ingredient of the offense under the statute.' The Court, however, did not so understand or construe the allegations quoted, but evidently took the view that it being previously admitted in effect that the combination was formed for the purpose of maliciously injuring The Journal Company the allegations to the effect that the motive for such injury was inspired by trade competition or business rivalry was not a sufficient excuse. In this, it is submitted, the Court was right. It might be very advantageous from a business point of view, for example, for a business competitor to burn his rival's place of business or even to slay such rival, but it would scarcely be admitted as a defense in such a case that there was no personal feeling in the matter, but that the act was done merely to gain a business advantage. These are extreme illustrations but they serve to show that if there be no other legal justification or excuse for an act, the mere fact that it may have been done "in trade competition" does not make it lawful. But if it be conceded for the sake of argument that the state Court was wrong in that it may have not have given proper effect to the averments of the pleas of the plaintiffs in error which were intended to be a justification or excuse for their admitted acts and conduct, this obviously would not have the effect of extending the meaning or construction of the statute to cover combinations in which there was no element of malice or wrongful intent to injure, but would at most merely amount to an error of the Court, in construing the allegations of the pleas.

The statute, therefore, stands as construed by the decision in *State ex rel Durner vs. Huegin*, supra, which construction under the settled rules of this Court is conclusive here.

So construed the statute is merely declaratory of the common law.

Hawkins' Pleas of the Crown, Ch. 27, Sec. 2;
Rex vs. Eccles, 1 Leach, 274;
Chitty Cr. Law, 1139;
Archibold Criminal Practice and Pleading, 1829;
Queen vs. Kendrick, 5 Q. B. D., 49.

Authorities in this country to the same effect might be multiplied indefinitely. For example, see

Crump vs. Commonwealth, 84 Va., 927;
State vs. Stewart, 59 Vt., 273;
State vs. Donnelson, 32 N. J. L., 151, 156;
State vs. Glidden, 55 Conn., 46;
People vs. Petheram, 64 Mich., 252;
State vs. Burnham, 15 N. H., 403;
Commonwealth vs. Carlisle, Brightly, 36.

The language of Mr. Chief Justice Gibson in the case last cited is so pertinent that we venture to quote it:

"A combination is criminal when the act to be done has a "necessary tendency to prejudice the public or to oppress in- "dividuals by unjustly subjecting them to the power of the "confederates. It will therefore be perceived that the motive "for combining, or what is the same thing, the nature of the "object to be attained as a consequence of the lawful act, is "in this class of cases the discriminating circumstance. "Where the act is lawful for an individual it can be the sub- "ject of a conspiracy when done in concert only where there "is a direct intention that injury shall result from it, or where "the object is to benefit the conspirators to the prejudice of "the public or the oppression of individuals, and where such "prejudice or oppression is the natural and necessary con- "sequence."

Even a cursory review of the adjudicated cases is sufficient to demonstrate that the general definition of conspiracy at common law frequently found in the books, to-wit: that it is a combination of persons to do an act unlawful in itself, or an act not in itself unlawful by unlawful means, is not strictly accurate or sufficiently comprehensive to cover all cases.

Take, for illustration, a combination to do an act highly immoral or against recognized rules of public policy. Here the act in itself may not be unlawful, nor need the means by which it is to be accomplished be in themselves unlawful; yet it is thoroughly established that such a combination was illegal and indictable at the common law.

(See the exhaustive review of the law of criminal conspiracy in State vs. Buchanan, 5 Harris & Johnson, 317.)

In *Farmers' Loan & Trust Company vs. Northern Pacific R. R. Co.*, 60 Fed Rep., 803, at page 817, it was said, referring to the statute in question and other cognate provisions:

"These statutes are declaratory of the common law and "wholly condemn all conspiracies to injure or oppress or to "interfere with the rights of others."

In Arthur vs. Oakes, 63 Fed. Rep. 310, decided by the Court of Appeals for the 7th Circuit, Mr. Justice Harlan in the course of an exhaustive discussion and review of the rules and principles of the common law governing the offense of conspiracy, said:

"The principle that a combination or conspiracy of two "or more persons to injure the rights of others is illegal, al- "though nothing may have been done in execution of that in- "tent, has been embodied in the Statutes of Wisconsin, in "which state the present cause is pending,"

citing and quoting the statute here in question. *Ib. page 325.*

It would savor of supererogation to multiply authorities to the effect that the statute as construed by the ultimate tribunal of the state is merely declaratory of the common law, and in that view it is, of course, unnecessary to argue that the statute is not unconstitutional. No provision of the state or federal constitution has been referred to which gives to any individual or combination of individuals the right to commit acts which were recognized as crimes at the common law.

II.

It was not necessary, even at common law, to make a combination formed for the purpose of injuring the business of another illegal that such purpose should be the sole or

ultimate object of the combination. It was sufficient if there were a direct and immediate purpose to injure others, even though the ultimate object were to benefit the parties to the combination:

People vs. Petheram, 64 Mich., 252, 261, 262;
Arthur vs. Oakes, 63 Fed., 310;
Hopkins vs. Oakley Stave Co., 83 Fed. Rep., 912;
Temperton vs. Russell (1893), 1 Q. B. Div., 715;
Steamship Co. vs. McGregor, 23 Q. B. Div., 715;
Quinn vs. Leathem (*House of Lords*, *1901*), Law Rep. App. Cas., 495.

"A combination for the purpose of injuring another is a combination directed personally against the party to be injured, and the law allowing parties to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their purpose the immediate hurt of another:"

Greenhood on Public Policy, 651.

From the authorities, it would seem that the lawfulness or unlawfulness of a combination, the result of which was or might be to injure the business of others, turned at the common law upon the question of the intent with which the combination was formed; the question of the primary or immediate purpose—whether the injury to others was incidental, indirect and consequential, or was the immediate and direct purpose of the combination, notwithstanding the ultimate object might be advantage to the parties to the combination

It would be a hopeless task, as well as a useless one, to undertake to review the almost innumerable cases on the subject; but it is submitted that practically all the cases can be reconciled on the ground immediately above suggested. As examples of the many cases that might be cited illustrating the doctrine of the common law on the subject, we submit the following:

Arthur vs. Oakes (*C. C. A.*), 63 Fed., 323, *supra;*
Doremus vs. Hennesy, 176 Ill., 608;

Barr vs. Trades Councils (*N. J. Chan.*), 30 Atl Rep., 881;
Hilton vs. Eckersley, 6 El. & Bl., 47, 74;
Steamship Co, vs. McKenna, 30 Fed., 48;
Casey vs. Typographical Union, 45 Fed., 138;
Callan vs. Wilson, 127 U. S., 547;
Mogul S. S. Co. vs. McGregor, 23 Q. B. Div., 598; A. C., 25;
Continental Ins. Co. vs. Board of Underwriters, 67 Fed., 319;
Temperton vs. Russell, 1 Q. B. Div., 715;
Walker vs. Cronyn, 107 Mass., 555;
Graham vs. St. Charles St. Ry. Co., 27 R. L. A., 416;
Hopkins vs. Oakley Stave Co., 83 Fed., 918;
Quinn vs. Leathem, Law Rep. App. Cas. (1901), 515. overruling *Allen vs. Flood*, *H. L. Appeal Cases* (1898), 1.

We think it may be said that the authorities conclusively establish the following propositions:

1. The *civil action of conspiracy* at common law was a substantive right of action, and did not necessarily depend upon any wrong or violation of legal right independent of the combination feature.

(a) The fact of the combination and the element of malice might give a right of action where, without the conjunction of the combination and malice, no action would lie.

(b) In order, however, to give rise to a right of civil action, actual damage must have resulted.

2. The *crime of conspiracy* at common law was a substantive offense, not necessarily dependent upon the inherent criminality or unlawfulness of the thing to be done or of the measures by which it was to be accomplished.

(a) It had its foundation in public policy and in the peace and welfare of society, and had no necessary connection with any question of civil damages or pecuniary loss to particular individuals.

It is obvious from the authorities that the rule which ordinarily prevails in civil actions, that the motive or

intent with which an act is done is not an element of the cause of action, is not generally applicable to civil actions of conspiracy, and is not applicable at all to conspiracy in its criminal aspects any more than to any other criminal offense. Likewise, the general rule that what may be lawfully done by one may with equal propriety be done by many is manifestly not applicable to the case of conspiracy.

As illustrating the distinction between the civil action and the criminal offense, and the principles on which each rests, see

6 Amer. & Eng. Enc. (New Ed.), 872.
Bishop on Non-Contract Law, Sec. 592;
Clifford vs. Brandon, 2 Campbell. 358;
Boutwell vs. Marr, 71 Vt., 6.

III.

Even were it conceded that the intent of the statute was to enlarge the scope of the protection afforded by the common law to the freedom of trade and competition so as to comprehend within its purview all combinations whether formed for the direct purpose of injuring the business of another, or for the purpose of benefiting the parties to the combination by wilfully injuring the business of others, it would still be clearly within the limits of legislative authority.

The state has a direct interest in the encouragement and protection of individual enterprise, and to that end, independently of the question of motive or intent, it may make all reasonable regulations to protect the individual from the unequal power of combinations. The basis of this interest is public policy—the basis of authority for all police regulations. *U. S. vs. Trans-Missouri Freight Association, 166 U. S. 290.* In the interest of public policy the legislature may authorize a monopoly: *Slaughter-House Cases*, 16 Wall. 36. Conversely, it may prohibit monopolies, a power very frequently exercised. Between these two extremes its power is plenary to regulate or restrict the power of combinations to hamper or destroy individual enterprise, individual effort. To promote

and protect the healthy and orderly growth of business, of the industrial and commercial interests of the state is one of the chief purposes of government. It is separate action that begets competition; competition that promotes progress. To protect the individual against the combined strength of the multitude is not only a right but the duty of the state. The right to earn a living, to carry on his business free from malicious interference, free from the unequal power of combinations f rmed to harass, oppress and destroy is one of the recognized rights of the individual member of a civilized society. To secure this right, to secure the peace, prosperity and happiness of the people, to secure its own existence the state must have the power to say that combinations formed to control or restrict trade; combinations to injure, destroy, molest or disturb the right of the individual to carry on his business in his own way, are illegal.

The ground on which the constitutionality of the present statute is challenged seems to be that it is an undue restriction of the right of individuals to combine for the purpose of using their joint efforts to promote their own business welfare. The question in the aspects in which it is presented seems so entirely free from novelty, that any extended discussion thereof on our part could hardly be profitable. The subject is fully covered by recent cases in this court, such for example as *U. S. vs. Trans-Missouri Freight Association, Supra.*

We call the attention of the court to a few of the many cases that might be cited illustrative of the limitations upon the scope of the federal constitution to abridge the powers of the state to regulate its internal affairs affecting the peace, order and general welfare of the community:

Allgeyer vs. Louisiana, 165 U. S., 589;
Munn vs. Illinois, 94 U. S., 113, 124;
Slaughter-House Cases, 16 Wall., 62;
Barbier vs. Conway, 113 U. S., 31;
Soon Hing vs. Crowley, 113 U. S., 709.

As said by Mr. Justice Miller in the Slaughter-House Cases *supra*, at page 62: "This police power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comforts of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property. It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or upon acknowledged general principles ever can be, made."

Also Mr. Justice Field in *Barbier vs. Conway, 113 U. S.*, at page 31:

"But neither the amendment" (the 14th),—"broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity."

Under this power the legislature of the state of Wisconsin has provided "that every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal": *General Statutes of Wis., 1898, Sec. 1747c.*

The same statute further provides: "Every person who shall combine or conspire with any other person to monopolize, or attempt to monopolize any part of the trade or commerce in this state" (Wisconsin) "shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state" (Wiscon-

sin) "for all damages he may sustain by reason of the doing of anything forbidden by this section."

The foregoing statute was passed in 1893 and was copied substantially from the act of Congress on the same subject known as the Sherman act, the validity of which has been sustained by this Court.

Similar statutes to the one here called in question have been in force in other states for many years and their constitutionality has been uniformly upheld or assumed without question.

Section 168 of the Penal Code of the state of New York makes it a misdemeanor for two or more persons to conspire to do an act injurious to the public health, public morals, or to trade or commerce, etc. That statute, it will be seen, is much broader in its terms than the statute here under consideration. It was construed by the highest Court of the state of New York in a very extreme case, and its constitutionality was not questioned:

People vs. Sheldon, 139 N. Y., 251; 34 N. E. Rep., 785.

Later its validity was attacked and expressly upheld in *Matter of Davies, 168 N. Y., 89, 101.*

In Illinois it is made a criminal offense "for two or more persons to wilfully and maliciously combine or conspire together to obstruct or impede, by any act or by means of intimidation, the regular operation and conduct of the business of any railroad company or any other corporation, firm or individual in the state.":

Rev. Stats. of Ill., Sec. 130.

In Indiana it is made a crime to coerce an employe by making non-membership in any labor organization a condition of employment:

Burns' Stats., Sec. 2302.

In Iowa, by Section 5059 of the General Statutes of that state, it is made a crime to conspire "wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, etc".

In Minnesota (Stats. of 1894, Sec. 6423) it is made a crime to combine to prevent a person from procuring employment by threats, promises or the circulation of black-lists, or to procure the discharge of an employe.

In New Hampshire, by the Public Statutes of 1891, (Ch. 266, Sec. 12) it is made a crime "to interfere in any way whatever to *injure or damage* another in his person or property while engaged in his lawful business, trade or occupation, or while on the way to or from the same; or to endeavor to prevent any person from engaging in his lawful business, trade or calling."

In Rhode Island, by the General Laws of 1896 (Ch. 279, Sec. 45), it is a crime "to wilfully and maliciously or mischievously * * * obstruct another in the prosecution of his lawful business or pursuits, in any manner."

It will be seen that these various statutes, while differing somewhat in their terms and scope, are all directed to substantially the same end, to-wit: the encouragment of industry, by the prevention of malicious interference therewith, and the prohibition of combinations organized and intended for the purpose of hampering, hindering or destroying individual enterprise in legitimate trade and commerce. The fact that such statutes so generally prevail in the various states is strong evidence, not only of the necessity for such restraints, but of the general policy of legislation on the subject and the understanding of the Courts that such statutes are not without the legislative power.

Respectfully,

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

JAMES G. FLANDERS, of Counsel,

For Defendant in Error, The State of Wisconsin.

e t o t y p o s a s r o l d i t s h e h

FREE COPY.

Supreme Court of the United States

OCTOBER TERM, 1903.

Nos. 297 and 298.

3 & 4

Office Supreme Court U.S.
FILED
OCT 13 1903
JAMES H. McKENNEY,
Clerk.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Supplemental Brief.

LAFAYETTE M. STURDEVANT,
Attorney General of Wisconsin.

JAMES G. FLANDERS,
Of Counsel for Defendant in Error, The State of Wisconsin.

Supreme Court of the United State

OCTOBER TERM, 1902.

Nos. 297 and 298.

ANDREW J. AIKENS,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

ALBERT HUEGIN,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

Supplemental Brief.

May it Please the Court:

At different times during the progress of these cases so much as been said and printed about the case of *Allen vs. Flood et al.* (Law. Rep. Appeal Cases, 1898, page 1) that we ask leave to have considered as a part of the brief of the defendant in error the following references to and comments upon that case. At the time the original brief on behalf of the State of Wisconsin was printed, counsel for the state was incapacitated by sickness from supervising the completion thereof. Otherwise the suggestions herewith submitted would have been incorporated in that brief:

FIRST.

The case of *Allen vs. Flood* in its facts was and is essentially different from the cases now being considered, as well as from the case of *Quinn vs. Leathem* (Law. Rep. Appeal Cases, 1901, page 495), in which *Allen vs. Flood* was discussed.

Flood and Taylor, plaintiffs below, were ship-wrights employed by the Glengall Iron Company in repairing a ship, and brought an action against Allen for maliciously and wrongfully, and with intent to injure the plaintiffs, procuring the Glengall Company to break their contract with the plaintiffs and not to enter into a new contract. Plaintiffs were members of the Boiler Makers' Society which objected to the employment of ship-wrights on iron work. Prior to their employment by the Glengall Company plaintiffs had been employed by Mills & Knight in doing iron work on a ship. The boiler makers employed by the Glengall Company, numbering about forty, having discovered that the plaintiffs had been doing such iron work became much excited and began to talk of leaving the employment of the Glengall Company. Allen was the London delegate of the Boiler Makers' Society, and, in response to a telegram from one of the boiler makers, came to the place where the plaintiffs were employed. Subsequently he had an interview with the manager and with the foreman of the Glengall Company and at the end of the same day the plaintiffs were discharged by the Glengall Company's manager. Plaintiffs then brought the action above described.

In *Quinn vs. Leathem*, the facts were as follows:

In July, 1895, the plaintiff was a dealer in meats at Lisburn, in Ireland, and had been for more than twenty years. He employed Dickie and other assistants not members of the Butchers' Union. Craig was president, Quinn, treasurer, and Davey, secretary of the Butchers' Union, and Dornan and Shaw were members of such Union. The Union insisted that plaintiff should discharge all non-union employes. Plaintiff not complying, the Union notified Munce (who had been buying meat from Leathem for about twenty years) that Munce's employes would be called out if Munce continued to buy plaintiff's beef.

Thereupon, Munce ceased to deal with the plaintiff and plaintiff was put to a great loss, a quantity of fine meat having been killed for Munce. Dickie, who had been ten years in plaintiff's employ, was called out by the Society and left in the middle of the week. Evidence was given that blacklists were issued by the Butchers' Union containing the names of tradesmen who had dealings with the plaintiff, one of whom was induced not to deal with plaintiff, but there was no evidence connecting Quinn with these lists.

It will be observed that both of these cases are civil actions while the defendants in the cases under consideration by this Court were prosecuted criminally for an offense arising under a statute of Wisconsin.

SECOND.

An inspection of the opinion in *Quinn vs. Leathem* will disclose the fact that *Allen vs. Flood*, in so far as it contains anything supporting the contention of the plaintiffs in error in the cases under consideration, has been practically overruled. We call attention to the following extracts from the opinions in *Quinn vs. Leathem*, discussing and distinguishing *Allen vs. Flood*. The italics are our own.

The Earl of Halsbury, L. C., in his opinion (pages 505 and 506) said:

"My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of the jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If, upon these facts so found, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community. Nor, indeed, do I understand that anyone has doubted that before the decision

of *Allen vs. Flood* in this House such fact would have established a cause of action against the defendants." * * *

In the same case Lord Macnaghten said in his opinion (page 511):

"That a conspiracy to injure—an oppressive combination, differs widely from an invasion of civil rights by a single individual, cannot be doubted. I agree in substance with the remarks of Bowen, L. J., and Lords Bramwell and Hannan in the Mogul case (23 Q. B. D. 598, 1892, A. C. 25), 'A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors. But it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong.'"

In the same case Lord Shand in his opinion said (page 513):

"This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen vs. Flood*, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or wrong another, and not to advance the party's own trade interests, and injury has resulted, no action will lie; or to put the question in a popular form, whether the decision in *Allen vs. Flood* has made boycotting lawful?"

In the same case, on page 515, Lord Shand said in his opinion:

"It is only necessary to add that the defendants here have no such defense as *legitimate* trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen vs. Flood*, as a case of legitimate competition in the labor market, is essentially

different and gives no ground for the defendants' argument."

In the same case, Earl of Halsbury, L. C., said in his opinion (pages 506-507):

"Now, the hypothesis of fact upon which *Allen vs. Flood* was decided by a majority of this House was that the defendant there neither uttered nor carried into effect any threat at all; he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. *It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favor of his fellow members.* It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision."

In the same case, on page 514, Lord Shand said:

"As to the vital distinction between *Allen vs. Flood* and the present case, it may be stated in a single sentence. *In Allen vs. Flood the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing his own interests.'*"

And again on the same page:

"* * * The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labor market, and the effect of injury thus

caused to others from such competition, which was legitimate, was not a legal wrong.

"It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for the purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as injustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen vs. Flood*, as a case of legitimate competition in the labor market, is essentially different, and gives no ground for the defendants' argument."

In the same case, on page 529, Lord Brampton said in his opinion:

"I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willis J., in *Mulcahy vs. Reg.*, in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating J. and Pigott B., which was adopted by this House: 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. * * * * The number and the compact give weight and cause danger.'

"It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made subjects of civil actions like the present.

"In 1870, Cockburn, C. J., in delivering the unanimous judgment of Channell B., Cleasby B., Keating and Brett J. J., in *Reg. vs. Warburton*, said, 'It is not necessary, in order to

constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong.'"

THIRD.

It must be apparent that in *Allen vs. Flood* there was no question whatever of conspiracy (See *Quinn vs. Leathem*, pages 532, 533); that in *Quinn vs. Leathem* a conspiracy to injure the plaintiff was charged and proved; that in the cases under consideration a conspiracy to injure The Journal Company in its trade and business was charged and admitted by the defendants (See Transcript of Record, pages 20 and 21); and that loss of advertisers as a result of such conspiracy was also admitted (See Transcript, page 21); that in *Allen vs. Flood* the act complained of was the act of an individual, and that as stated in *Quinn vs. Leathem*, on page 532, "In the opinion of the Noble Lords who formed the majority of your Lordship's House, all that Allen did was to inform the employers of the plaintiff's that most of their workmen would leave them if they did not discharge the plaintiffs."

A careful inspection of the cases referred to will doubtless be made by the Court and will disclose that *Quinn vs. Leathem* fully supports the decision of the Supreme Court of the State of Wisconsin in the cases under consideration and that *Allen vs. Flood* is not an authority in point.

Respectfully submitted,

LAFAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

JAMES G. FLANDERS,

Of Counsel for Defendant in Error, The State of Wisconsin.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Nos. 3 and 4.

Office Supreme Court U. S.
FILED
OCT 10 1904
JAMES H. McKENNEY,
Clerk.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON REHEARING.

LAFAYETTE M. STURDEVANT,
Attorney-General of Wisconsin.

JAMES G. FLANDERS,
Of Counsel, for defendant in error, the State of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Nos. 3 and 4.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON REHEARING.

The briefs of counsel for plaintiffs in error have taken a wide range. A large part of the argument is devoted to a discussion of the principle that under our institutions of government, the individual is free to enter into contract or business relations with his fellows, or not, as he pleases. This entire branch of the argument is well summed up in *Cooley on Torts*, as quoted on page 41 in one of the briefs, as follows:

"It is a part of every man's civil rights that he be left at "liberty to refuse business relations with any person whomso- "ever, whether the refusal rests upon reason or is the result of "whim, caprice, prejudice or malice."

This proposition, as stated by the author, relates of course to individual and independent action, and thus limited, we have no disposition to dispute it.

Another large part of the argument is devoted to the proposition that an act otherwise legal, is not made illegal because of the motive from which it is done; and that an act which would be lawful if done without malice, is not made unlawful because of a malicious intent. If an extensive consideration or discussion of the authorities for and against this proposition should be regarded by the Court as assistful in the determination of the question to be decided in this case, we refer to the very elaborate note upon this subject, to the case of *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, as reported in 62 L. R. A., at page 673, in which the authorities, both *pro* and *con*, are exhaustively reviewed. The conclusion is stated as follows:

"It is believed that the weight of modern judicial opinion "sustains the following propositions:

"A person who suffers damage from an act the commission "of which does him no legal injury, can not maintain an action "against him who does it with malice and bad motive.

"If one does an act which he has a perfect legal right to do, "to accomplish some real benefit or pleasure to himself, or "others in whom he has a genuine interest, and for doing which "in good faith no action would lie, he is not rendered liable "to an action therefor by the fact that he did it from bad "motive and with intent to injure another, and such injury "results.

"But if one, with the sole and malicious purpose of injuring "another, and without any benefit, interest or pleasure (other "than that he derives from his wicked intent) to himself or "others, commit an act which, if done in good faith, would be "justifiable, he is liable in an action in favor of such other "person for the damages he may have sustained therefrom.

"The foregoing cases exhibit the diversity of judgment "upon the subject under consideration. The trouble has "chiefly arisen from a failure of the different Courts in which "the question has been discussed and variously adjudicated to "come to an agreement as to what is 'justifiable cause.' Chief "Justice Field, in *Vegelahn vs. Guenther*, 167 Mass., 92; 35 L. R. "A., 722; 44 N. E., 1077, at p. 102, states what is "undoubtedly true in saying: 'What constitutes justifiable "cause remains in some respects undetermined.' It would

"seem, however, that the tendency of modern decision is to-
"wards declaring illegal and actionable any act committed
"solely out of bad motive, or what has been aptly termed
"'unmixed malice' without justifiable cause, and which ma-
"terially injures, or is reasonably likely to injure, the person
"or feelings, or the business or occupation—in other words,
"the property rights—of another; and, as held in *State ex rel.*
"*Durner vs. Huegin* (approved and followed in *Hawardin vs.*
"*Youghiogheny & L. Coal Co.*, 111 Wis., 545; 55 L. R. A., 828; 87
"N. W., 472), and also *Boutwell vs. Marr*, 71 Vt., 1; 43 L. R. A.,
"803; 42 Atl., 607; *Carew vs. Rutherford*, 106 Mass., 1; 8 Am.
"Rep., 287, and *Delz vs. Winfree*, 80 Tex., 400; 16 S. W., 111,
"that such malicious act, committed under circum-
"stances which would not be actionable if done by an in-
"dividual, may become so if done by a combination or con-
"spiracy of several; and that such tendency has been brought
"about largely by the changed state of affairs in society and
"business relations, due, to a considerable extent, at least, to
"the great increase of labor organizations, and, correspond-
"ingly, to trusts, syndicates, and other combinations or associ-
"ations of employers, and to consequently numerous cases
"arising out of the differences between employer and em-
"ployee, labor and capital. It must be admitted, however, that
"this has not been brought about without a struggle on the
"part of not a few Courts and judges to maintain the doctrine
"that an act that will not subject an individual to a civil
"action can not be made the foundation of a cause of action
"against several who combine to commit the same. *Bohn Mfg.*
"*Co. vs. Hollis*, 54 Minn., 223, sub mon. *Bohn Mfg. Co. vs. North-*
"*western Lumbermen's Asso.*, 21 L. R. A., 337; 55 S. W., 1119;
"*Hunt vs. Simonds*, 19 Mo., 583,—*supra*, IV. a; *Orr vs. Home Mut.*
"*Ins. Co.*, 12 La. Ann., 255; 68 Am. Dec., 770, *supra*, IV. b;
"*Brewster vs. C. Miller's Sons Co.*, 101 Ky., 368; 38 L. R. A., 505;
"41 S. W., 301." (p. 727.)

As this discussion relates wholly to a right of civil action independent of statute, whichever way it may be resolved, we do not regard it as decisive or even relevant to the question at issue in this case,—which, as we understand it, is as to the power of the legislature to prohibit combinations which have for their purpose the malicious injury of trade. It is undoubtedly true, that if combinations of the character described in the statute as construed by the State Court, were illegal at common law and would give rise to a right of action in favor of one damaged thereby, it follows that it was within the

power of the legislature to prohibit them; for we think it would hardly be contended that the constitution of the United States confers upon any person or combination of persons a vested right to commit an act which was illegal at the common law. It does not follow, however, that if such combinations were not illegal at common law, the legislature has not the power to declare them illegal. We submit, therefore, that the entire argument of counsel for plaintiffs in error upon this branch of the case, with reference to the matter in issue before this Court, is a *non sequitur*.

The precise question presented for determination, we think, is correctly stated in the brief of counsel for plaintiffs in error, Huegin and Aikens, on page 5, as follows:

"Does Sec. 4466a, Stats. 1898, as interpreted and applied by "the Wisconsin Supreme Court, deprive the accused of their "liberty or property, or deny to them the equal protection of "the law, in violation of Section 1 of the 14th Amendment to "the Constitution of the United States."

The statute referred to is as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur- "pose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or "for the purpose of maliciously compelling another to do or "perform any act against his will, or preventing or hindering "another from doing or performing any lawful act, shall be "punished by imprisonment in the county jail not more than "one year or by fine not exceeding five hundred dollars."

We think the question before the Court may be further narrowed by eliminating the alternative offense described in the statute beginning with the words: "or for the purpose of maliciously compelling another to do or perform any act against his will," etc., as not affecting the accused and not calling for the conideration of the Court at this time.

The complaint under which the plaintiffs in error were arrested and convicted, charged them with a conspiracy to maliciously injure the business of another, an offense comprehended solely under that part of the statute which reads:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur-

"pose of wilfully or maliciously injuring another in his repu-
"tation, trade, business or profession, by any means whatever
"* * * shall be punished by imprisonment in the county
"jail not more than one year or by fine not exceeding five
"hundred dollars."

The plaintiffs are not affected by the rest of the statute, and therefore can not complain of it.

Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28, at page 43.
Clark vs. Kansas City, 176 U. S., 114.
Tellis vs. Lake Erie Railway, 175 U. S., 348.

Assuming, as we do, that plaintiffs in error can have no proper concern with the alternative part of the statute, which was separable and distinct and was in no wise applied to them, we will confine our attention entirely to the portion of the statute last quoted and under which they were accused and convicted.

I.

It seems strange that any constitutional question should ever have arisen under a statute thus limited by its terms to the interdiction of combinations of persons organized for the purpose of inflicting a wilful or malicious injury upon the business or reputation of another.

But we do not understand that plaintiffs in error complain of the terms of the statute, so much as of its interpretation by the Court. An examination of the briefs we think will show, however, that it was not so much of the interpretation of the statute of which they complain, as of the interpretation given by the Court to their acts and conduct, bringing them within the terms of the statute,—that is to say, the arguments of counsel are directed against the application of the statute to the specific case of the plaintiffs, rather than against the statute itself.

We desire in this connection to suggest that the question before this Court, as we understand it, is not as to the correctness of the judgment of the State Court in judging of the character of the combination, or the quality of the acts and

conduct of plaintiffs in error, as to whether or not they come within the terms of the statute, but whether or not the statute is constitutional according to its terms and the interpretation placed thereon by the State Court. For it is submitted that if the statute as declared by the legislature and the courts as to the class of combinations to which it was intended to apply, is constitutional, it is not made unconstitutional, because improperly applied to a specific case. The rule in this respect is clearly laid down in *Arrowsmith vs. Harmoning*, 118 U. S., 194, as follows:

"When the legislature of a state enacts laws for the gov-
"ernment of its courts while exercising their respective juris-
"dictions, which, if followed, will furnish parties the necessary
"constitutional protection of life, liberty and property, it has
"performed its constitutional duty; and if one of its courts,
"acting within its jurisdiction, makes an erroneous decision
"in this respect, the state can not be deemed guilty of violat-
"ing the constitutional provision that no state shall deprive a
"person of life, liberty or property without due process of
"law."

The general application and authority of this rule is recognized in *In re Storti*, 109 Fed. Rep., 807, 809, as follows:

"Beginning with the case of *Arrowsmith vs. Harmoning*, 118
"U. S., 194, and following down through a long line of cases and
"also through a line of parallel cases raising the same ques-
"tion, but in different form, it is held that the 14th amend-
"ment does not apply where the legislature has done its duty
"and where the fault is either with the courts or with the
"officials."

For illustration,—a statute against murder, properly describing the elements of that offense, would not be rendered unconstitutional if the courts, in a particular case, recognizing the true meaning of the statute, should erroneously apply it to a case of justifiable homicide. It would hardly be contended that such erroneous application would make the statute unconstitutional.

We respectfully submit, as we think may be clearly demonstrated, that the statute was correctly and properly applied to the case at bar; but whatever fault, if any, there may have been in its application, the interpretation of the statute by the Court was well within its terms, and is not

open to question on constitutional grounds.

As indicated in our former brief filed herein, the statute was construed by the Supreme Court of the State on habeas corpus proceedings based on the alleged insufficiency of the complaint on which plaintiffs in error were arrested.

State ex rel. Durner vs. Huegin et al., 110 Wis., 89.
(Record 6.)

The Court was called upon in that case to construe the statute with reference to its meaning, scope and general application, and also to construe the acts of the plaintiffs in error charged in the complaint, to ascertain if they were amenable to the statute. We will undertake to give as near as may be, in the language of the Court, the interpretation of the statute *and of the acts of the plaintiffs in error in contradistinction.* In the syllabus of the case, prepared by Mr. Justice Marshall, who wrote the opinion, summarizing the decision of the Court, it is said:

"A complaint stating that three persons, naming them, "concerted together, using substantially the language of the "statute, for the purpose of maliciously injuring another in "his business, describes the conspiracy made criminal by Sec. "4466a, Statutes of 1898.

"An agreement between several independent concerns, "each publishing a newspaper and furnishing thereby means "for advertising, to compel a fourth person engaged in like "business to reduce his rates for advertising or lose customers, "indicates a malicious purpose to injure the business of the "latter within the meaning of Sec. 4466a, Statutes of 1898.

"If Sec. 4466a be regarded as describing a conspiracy be-"tween owners of independent enterprises to control the rates "charged in their line of work in any locality, great or small, "it is not constitutional. *However, it can not be so regarded, for it "makes the malicious purpose to injure an essential.*

"Several persons, conducting independent business enter-"prises, may, in the absence of a statute, combine to control "prices for the purpose of promoting their individual interests, "and in their operations to that end impoverish a rival and "drive him out of business, there being no malicious intent in "their conduct, using the term in the sense of malice in law. "Sec. 4466a does not go that far.

"All agreements to maliciously injure another in any way "are contrary to the policy of the law. Legislative authority

"is ample to outlaw such agreements to the extent of making "the participants therein liable civilly and criminally.

* * * * * * *

"A combination of persons to injure another without any "just cause, *such as an injury that is not an incidental effect* of the "promotion of the legitimate interests of the members of the "combine, is a conspiracy to inflict a malicious injury upon "another at common law, and is such an injury under the "statute (Sec. 4466a, Stats. 1898) if it relates to another's "reputation, business, trade or profession.

* * * * * * *

"The term 'malicious injury' as used in the statute, is syn- "onymous with that term in the law of conspiracy independent "of the statute.

"Sec. 4466a, Stats. 1898, is a mere declaration of the com- "mon law. Its only effect is, as to the particular matters "stated therein, to remove the necessity for an overt act, "which is required by the change in the common law by Sec. "4568."

In the opinion, expressly defining the scope, meaning and limitations of the statute, it was said:

"Frequent recurrence to the fundamental principles of "actionable conspiracy is essential to keep from ingrafting "upon a judicial system something which is entirely new, to "meet the desires of those who arrogate to themselves the "right, not only to monopolize trade or effort in some particu- "lar field, but, under the guise of fair trade, to control or de- "stroy the business of competitors without any expectation of "profit to themselves,—to wrongfully harm such competitors "merely because they insist upon individual right to conduct "individual business in one's own way. A combination with "the malicious purpose indicated is an actionable wrong. "Had it not been for Sec. 4568, Stats. 1898, adding to the com- "mon law essentials of an indictable conspiracy the necessity "for an overt act, Sec. 4466a would have been unnecessary to "enable the Court to punish, criminally, such wrongs. That "is a mere declaration of the common law. It operates as a "repeal, by inplication, of Sec. 4568 so far as otherwise a "specific overt act would be required to render a malicious "conspiracy to injure the trade, business, reputation or profes- "sion of another, an offense. The old doctrine, with its "ancient meaning, should be referred to in construing Sec. "4466a. An actionable conspiracy is a combination of two or "more persons for the purpose of accomplishing a criminal "or unlawful object by criminal or unlawful means. One may, "through purely malicious motives, attract to himself an- "other's customers and the injury be so slight in contempla-

"tion of law that *De minimis non curat lex* applies; but when "he unites others with him to maliciously injure the business "of another for the mere gratification, in whole or in part, of "a desire to inflict such injury, the condition of there being "the combined force of many directed towards another, char- "acterized by the element of malice, renders the act of com- "bining for the particular purpose unlawful and a substantive "offense, in the absence of a statute requiring some additional "element.

* * * * * * *

"Our conclusion is this: the term 'malicious injury' as used "in the statute, is synonymous with that term at the common "law; it refers to the infliction of a wrongful injury intention- "ally; such a wrong is actionable even though the same pur- "pose, if formed and executed by an individual, would not, in "contemplation of the law, be considered sufficiently serious "to call successfully for legal redress. There is nothing in "this militating at all against the right of individuals to com- "bine and associate together for the purpose of promoting "their individual welfare in any legitimate way. It strikes "only at the assertion of a right of combining to resort to the "use, as a single power, of the individual abilities and re- "sources of two or more to wrongfully accomplish harm to "another in the line of those things mentioned in the statute." (Pages 262, 263.)

With reference to the facts of the case,—the specific acts with which plaintiffs in error were charged, the Court said:

"At this time it seems necessary to re-state the charge "contained in the complaint as we have construed it. Upon "that turn the remaining questions to be considered.

"According to the complaint it was in substance agreed "between the defendants in error Melvin A. Hoyt, represent- "ing The Daily News; Albert Huegin, representing The Mil- "waukee Sentinel, and Andrew J. Aikens, representing The "Evening Wisconsin,—each controlling the columns of the "paper with which he was connected, each paper being a daily "newspaper published in the city of Milwaukee and a medium "for advertising business in the same field occupied by The "Journal Company, the publisher of a newspaper called The "Milwaukee Journal, also a medium for advertising business, "—that whereas the latter had raised its charges twenty-five "per cent. above those customarily charged for such service "by it and the proprietors of the other papers named, if any "person agreed to pay or paid the Journal Company its in- "creased rates for advertising in its paper, he should not have "the privilege of advertising in any of the other newspapers "unless he should advertise in all of them at such increased

"rates; but that any person who should decline to pay The "Journal Company said increased rates for advertising in its "paper, should have the privilege of advertising in any or all "of the other papers at the old rate. Now, it is said there is "nothing in that from which a reasonable inference of the "malicious purposes called for by the statute can arise; that "such intent means bad intent to injure another in the sense "of committing an actionable injury, while the terms of the "agreement indicate only a purpose on the part of those con- "cerned in it to promote their own interests regardless of "those of their competitor. The malice of the statute is evi- "dently malice in law, not necessarily ill-will or malice in "fact. It means, as is commonly said, a wrongful act done "intentionally without just cause or excuse. The statute does "not deal with things corporeal, as the person or property of "another, but with his reputation, trade, business or profes- "sion. If we can see in the agreement, by reasonable infer- "ence, the *independent* purpose to harm The Journal Com- "pany in its business of furnishing to the trade facilities for "advertising, that is sufficient as regards the element of malice. "There seems to be no difficulty about that. The principle "that every one is presumed to intend the natural and prob- "able consequences of his voluntary acts suggests at once, "upon looking at the agreement, that the primary, if not the "sole, end in view was to force The Journal Company to re- "duce its advertising rates to the old standard or cause it to "lose custom, either of which alternatives would result in "pecuniary loss to it and one of them in the destruction of the "freedom of action every one is entitled to enjoy in the conduct "of his business, without turning any pecuniary or other legi- "timate gain to its competitors. If the agreement contem- "plated that any legitimate benefit, under the circumstances, "would flow to the participants therein or the concerns they "represented, by compelling The Journal Company to reduce "its rates for advertising, the ground for it is not disclosed by "the transaction as stated, and it is one of those mysteries of "a special calling that persons outside thereof can not com- "prehend. How could any material benefit have been ex- "pected by any member of the combine, from causing a cus- "tomer or customers of The Journal Company to leave it "rather than be denied the use of any other efficient news- "paper medium for advertising in the field occupied by the "four competitors?"

It thus appears it was expressly held that to bring plaintiffs in error within the statute, it must appear that the purpose of the combination, with which they were charged, was to inflict a malicious injury upon the business of The Journal

Company, in the sense in which the term "malicious injury" was understood at the common law; and the Court has, we conceive, correctly defined the term "malicious injury" as used at common law, to be an act resulting in damage, intentionally done for the purpose of causing harm or loss to another, without legal justification or excuse. That a combination organized with such purpose was indictable as a conspiracy at the common law, is, we believe, not open to controversy. The Court concluded, as matter of fact—as indicated in the opinion that the only fair inference from the nature of the combination as it was disclosed in the complaint, was that it was formed for the purpose of malicious injury;—that is to say, for the purpose of causing loss or damage to The Journal Company without reference to any incidental advantage or benefit to the parties to the combination, and without any reasonable expectation of any such advantage or benefit. The Court did not hold, as seems to be understood by counsel for plaintiffs in error, that fair or legitimate business competition, if such had been shown to be the purpose of the combination, might not have been a justification, but held distinctly that the combination as disclosed by the complaint, could not by any legitimate inference be considered an act of legitimate competition, for the reason that it had no apparent tendency to advance the business interests of the parties to the combination. Counsel for plaintiffs in error earnestly insist that in this conclusion the Court was in error, and undertake to show, by various lines of reasoning, how the parties to the combination might have been benefited. We assume that this Court will not undertake to decide between counsel and the State Court, upon this difference of opinion with reference to the motives of the combination in question. Even if it were conceded (which it is not) an error of judgment was committed by the State Court as to the quality of the defendants' acts by virtue of which they were brought within the terms of the statute, we submit that for the purpose of this case, this Court must accept the construction placed upon the statute by the State Court, which was in effect that its meaning and intent is to prohibit a combina-

tion formed for the purpose of maliciously injuring the business of another, using the term "malicious injury" in the sense of the common law; and must also accept the construction placed by the Court upon the acts with which plaintiffs in error were charged, which was that they plainly evinced a purpose to wantonly and maliciously injure the business of The Journal Company, without reference to their own profit or advantage in business,—in other words, without the justification or excuse of legitimate competition.

It is contended that the effect of this decision, which was rendered on the sufficiency of the complaint as indicated, was modified by the subsequent judgment of the Supreme Court confirming the judgment of conviction in the Court below. A brief reference to the record, we think, will show that such is not the case.

Following the decision of the Supreme Court sustaining the complaint, an information was filed following precisely the language of the complaint. The defendant Hoyt interposed a demurrer (Record 14). This was overruled and he elected to stand upon his demurrer. The defendants Huegin and Aikens each interposed a special plea, in the nature of a confession and an attempted avoidance. The confession admitted the combination and agreement and the acts charged in pursuance thereof, as alleged in the information, and also that the intent thereof was to injure The Journal Company. In attempted avoidance it was pleaded,

"That these acts, intentions, agreements and combinations "were done, harbored, made and entered into in trade compe- "tition, and that such acts, intentions, agreements and com- "binations, and none other, constituted the alleged unlawful "conspiracy in said information mentioned."

By standing upon his demurrer, the defendant Hoyt of course admitted the charges of the information. The other defendants, by confessing the combination and that its purpose was to injure the Journal Company, admitted in effect that it was for no other purpose—*Expressio unius alterius exclusio est*,—that is to say, by the express confession that the purpose of the combination was to injure the Journal Com-

pany, every other purpose not expressly declared is excluded.

The State Supreme Court, as indicated in its opinion on the former appeal, was unable to see anything in the nature of the combination as disclosed in the complaint and subsequently in the information, but a wanton and malicious purpose to injure a business rival. Now, as it is entirely conceivable that a purely malicious injury may be inspired by trade competition, or even done in the course thereof, the general allegation that the combination was formed and the acts done in trade competition, is entirely consistent with the confession that its sole purpose was to injure the Journal. It was certainly consistent with the hypothesis that such was its primary purpose.

While it may be difficult to define in a general statement the limit of incidental damage to others to which trade competition may be carried, we submit that to make it legitimate, the expected benefit should always be the primary or ultimate object, with the purpose to injure or destroy, if present at all, incidental or subordinate.

The defendants were fully advised by the opinion of the Court, passing upon the sufficiency of the complaint, that *prima facie* and without explanation, the combination disclosed in the complaint could not be regarded as an act of legitimate business competition. No explanation to rebut such inference was offered in the pleadings of the defendants to the information; and the demurrers of the state to the pleas were sustained. The defendants refused to plead over and judgment went accordingly. The judgments were confirmed by the Supreme Court, strictly on the ground of *res judicata*.

It can not be doubted that had the defendants interposed proper pleas to the information, to put in issue the charge of an intent to inflict a malicious injury, which was not only expressly charged in the information, but which the Supreme Court held was fairly inferable from the facts stated, an issue of fact would have been raised upon which they would have been entitled to the verdict of a jury.

It is respectfully submitted that the broad claim of trade competition, unexplained by any specifications of fact upon which it was based, with no denial of the malicious purpose and intent expressly charged in the information, was utterly insufficient as an avoidance of the matter confessed. Trade competition is a very elastic term, and can not be made a justification for everything that may be done in its name. We believe it is recorded that crimes have been committed in the name of religion itself. All trade competition is not legitimate;—some of it is fair, and some grossly unfair and unjustifiable. The question, we submit, so far as trade competition might have been been available as a defense, was not whether the combination was inspired by trade competition, *but whether or not it was a legitimate act of trade competition.*

II.

As argued above, we do not think the test of the constitutionality of the law in question is whether or not the legislature might prohibit combinations of the specific character as that with which the plaintiffs in error were charged; but even if this test be applied to the case, the result is the same.

It is argued that the application of the statute by the State Court to the specific case of plaintiffs in error makes it unconstitutional because it interferes with the liberty of contract guaranteed to citizens by the federal constitution.

BUT THE LIBERTY OF CONTRACT FOR WHICH THEY CONTEND IS THE LIBERTY OF COMPETITORS IN BUSINESS TO ENTER INTO AGREEMENTS AND COMBINATIONS BETWEEN THEMSELVES, FOR THE PURPOSE OF SO REGULATING AND CONTROLLING PRICES AS TO CRIPPLE OR DESTROY OTHER COMPETITORS.

This, as we understand, is what is claimed was in fact the purpose of the combination. Accepting these premises for the sake of argument, it is manifest that the tendency of the combination was to restrict the freedom of contract and competition between the parties to the combination and to foster a monopoly of the advertising business by destroying a competitor.

If, for illustration, an advertiser who happened to be a patron of the Journal Company should apply to the Sentinel, the newspaper controlled by Huegin, for an advertisement, that paper, by the terms of the combination agreement was not free to deal with him upon a competitive basis as regards the other two parties to the combination, but was obliged to refuse his advertisement unless he should consent to either withdraw his advertisement from the Journal Company and refuse to advertise with it at its established rates, or else advertise not only with the Sentinel but with the other two papers to the combination as well, at an arbitrary and increased rate. It is not evident that one of the direct tendencies of the combination was to stifle competition between the parties thereto? By the terms of the combination, an advertiser who wished to advertise in the Journal and also in one of the other papers to the combination, was compelled not only to pay to that party to the combination in whose paper he wished to advertise, an arbitrary and very much higher price, but was also compelled to advertise in the other two papers at the same arbitrary rate.

The manifest tendency of the combination in this respect was to establish for the newspapers which were parties to it, an arbitrary and non-competitive rate for advertising, which was regulated and fixed by the combination, and incidentally to destroy the competition of the Journal Company. The combination therefore had a direct tendency to stifle competition and foster a monopoly.

Whether such a combination might lawfully have been entered into under the common law or not, it is well settled that the legislature of the state has ample power to prohibit it. A case very much in point is *State vs. Firemen's Fund Ins. Co.* (Mo. Sup. Ct.), 45 L. R. A., 363. In that case it was held that:

"An unlawful combination of insurers in violation of Mis-
"souri act 1897, prohibiting any pool or combination to regu-
"late prices or the premium to be paid for insurance, is made
"by insurance companies, each of which buys and furnishes
"to its agent the rate book and correction slips prepared by a
"certain person, while the agents form what is called an

"'Underwriter's Social Club,' to the secretary of which, who "is an inexperienced young man and not an insurance expert, "each local agent submits his daily report in an unsealed "envelope, addressed to his company, that the secretary may "see that the agent does not write policies at less than the "rates agreed."

It was further held that:

"The constitutional guaranty of the right to life, liberty "and property, does not include the right of insurers to con- "tract among themselves for the maintenance of rates."

In the opinion the Court said:

"It is claimed that Section 30 of Art. 2 of the Constitution "of Missouri provides that 'no person shall be deprived of life, "liberty or property without due process of law,'; and that "this act violates that provision, because it 'renders it unlaw- "ful for defendants to contract or agree among themselves, "or with the agents of other insurance companies, or for their "agents to contract and agree among themselves, for the rea- "sonable adjustment and maintenance of rates of premium to "be charged for insurance against fire, lightning, or storm in "this state.' This is a total misapprehension of the act. It "does not prohibit any company or the agents of any company, "from contracting with any person who desires to insure his "property upon any terms they two may agree upon. This is "the extent and true meaning of the right to contract. It "does prohibit any company, by itself or through its agent, "contracting with any other company or its agents not to con- "tract with the insured except upon terms which such insur- "ance companies or their agents have previously established. "In other words, it protects the company against the tempta- "tions of a trust or monopoly by refusing to permit it to strip "itself of the power to freely contract, for under the arrange- "ment shown, in this case, the applicant for insurance is free "to contract, but the company and its agent has already "limited and qualified its power by previous contract with "another company or its agent. The law has made this pro- "vision more out of regard for the otherwise helpless insurer "than from tender consideration for the insurance company, "but it incidentally preserves what it is here claimed it "denies,—the free, unrestrained power to contract by both "parties to it. Such laws have not only been adjudged consti- "tutional by the Supreme Court of the United States (*U. S. vs. "Trans-Missouri Freight Asso.*, 166 U. S., 290; *U. S. vs. Joint "Traffic Asso.*, 171 U. S., 558), and by the United States Court "of Appeals, *U. S. vs. Addyston Pipe & S. Co.*, 54 U. S. App., 723- "777; 85 Fed. Rep., 271; 29 C. C. A., 141, but the principles they

"announce have been expressly sanctioned by the Supreme "Courts of New York (*People vs. Sheldon*, 139 N. Y., 251; 23 L. "R. A., 221); of Pennsylvania (*Morris Run Coal Co. vs. Barclay "Coal Co.*, 68 Pa., 173; 8 Am. Rep., 159); of Ohio (*Central Ohio "Salt Co. vs. Guthrie*, 35 Ohio St., 666); of Kentucky (*Anderson "vs. Jett*, 89 Ky., 375; 6 L. R. A., 390); of Iowa (*Chapin vs. Brown*, "83 Iowa, 156; 12 L. R. A., 428); of Illinois (*Craft vs. McConoughy*, 79 Ill., 346; 22 Am. Rep., 171; *More vs. Bennett*, 140 Ill., "69; 15 L. R. A., 361); of Wisconsin (*Milwaukee Masons & B. "Asso. vs. Niezorawski*, 95 Wis., 129; 37 L. R. A., 127); of California (*Vulcan Powder Co. vs. Hercules Powder Co.*, 96 Cal., 510); "of Texas (*Texas Standard Oil Co. vs. Adoue*, 83 Tex., 650; 15 "L. R. A., 595), and of Louisiana (*India Bagging Asso. vs. Kock*, "14 La. Ann., 164). There is no more merit in this contention "than there would be that a law was unconstitutional which "prohibited two or more persons from conspiring to commit "murder, or burglary, or any other felony. There is no such "thing in civilized society, as the unrestrained power to contract. Every man surrenders some of his individual rights "when he associates with or becomes a part of any society or "government, and the power of the government is complete to "legislate so that, while according to every man the fullest "possible liberty to do what he pleases with his own, he must "not interfere with the similar right of others. This principle "underlies and runs through all governments and societies, "and is the cornerstone of the police power of the state."

Any association or combination of persons organized for the purpose of regulating prices is an unlawful combination.

Central Ohio Salt Co. vs. Guthrie, 35 Ohio St., 666.

Emery vs. Ohio Candle Co., 47 Ohio St., 320, 24 N. E., 660.

Distilling & Cattle Feeding Co. vs. People ex rel. Moloney, 156 Ill., 488, 41 N. E., 188.

Jackson vs. Akron Brick Asso., 53 Ohio St., 303, 35 L. R. A., 287, 41 N. E., 257.

Bishop vs. American Preservers' Co., 157 Ill., 284, 41 N. E., 765.

Santa Clara Valley Mill & Lumber Co. vs. Hayes, 76 Cal., 387, 18 Pac., 391.

Vulcan Powder Co. vs. Hercules Powder Co., 96 Cal., 510, 31 Pac., 581.

Arnot vs. Pitson & E. Coal Co., 68 N. Y., 558, 23 Am. Rep., 100.

Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa., 173, 8 Am. Rep., 159.

India Bagging Asso. vs. Kock, 83 Iowa, 297, 12 L. R. A., 428, 48 N. W., 1074.

People vs. Milk Exchange, 145 N. Y., 267, 27 L. R. A., 437, 39 N. E., 1062.

Ford vs. Chicago Milk Shippers Asso., 155 Ill., 166, 27 L. A. R., 298, 39 N. E., 651.

Pacific Factor Co. vs. Adler, 90 Cal., 110, 27 Pac., 36.

Judd vs. Harrington, 139 N. Y., 105, 34 N. E., 790.

De Witt Wire-Cloth Co. vs. New Jersey Wire-Cloth Co., 16 Daly, 529, 14 N. Y. Supp., 277.

John D. Park & Sons Co. vs. National Wholesale Druggists Asso., 50 N. Y. Supp., 1064.

Merz Capsule Co. vs. United States Capsule Co., 67 Fed., 414.

Cravens vs. Carter Crume Co., 34 C. C. A., 479, 92 Fed., 479.

It is not material whether the price is increased, or whether it is reduced, or whether the price fixed is a reasonable one or an unreasonable one.

U. S. vs. Trans-Missouri Freight Asso., 166 U. S., 290, 41 L. ed., 1007, 17 Sup. Ct. Rep., 540.

U. S. vs. Joint Traffic Asso., 171 U. S., 505, 43 L. ed., 259, 19 Sup. Ct. Rep., 25.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211, 44 L. ed.. 136, 20 Sup. Ct. Rep., 96.

Harding vs. American Glucose Co., 182 Ill., 551, 55 N. E., 577.

National Harrow Co. vs. Bement, 21 App. Div., 290, 47 N. Y. Supp., 462.

Richardson vs. Buhl, 77 Mich., 632, 6 L. R. A., 457, 43 N. W., 1102.

State ex rel. Watson vs. Standard Oil Co., 49 Ohio St., 137, 15 L. R. A., 516, 30 N. E., 279.

People vs. Milk Exchange, 145 N. Y., 267, 27 L. R. A., 437, 39 N. E., 1062.

Nor is it necessary that the purpose should be to establish a complete monopoly.

United States vs. E. C. Knight Co., 156 U. S., 1, 39 L. ed., 325, 15 Sup. Ct. Rep., 249.

Addyston Pipe & S. Co. vs. United States, 175 U. S., 211, 44 L. ed., 136, 20 Sup. Ct. Rep., 96.

Texas Standard Oil Co. vs. Adoue, 83 Tex., 650, 15 L. R. A., 598, 19 S. W., 274, 279.

By Art. 5 of the Amendments to the Constitution of the United States, the federal government is prohibited from depriving any person of life, liberty or property, without due process of law. This prohibition upon the federal government is precisely the same in terms as the prohibition upon the states by the 14th amendment under which it is claimed the liberty of plaintiffs in error has been violated. So it must be admitted that the power of the state to pass laws restricting or prohibiting combinations tending to the injury of trade and commerce within the state is at least as broad as the powers of Congress with reference to inter-state trade. The numerous decisions of the federal courts, therefore, arising under the so-called anti-trust law, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," with reference to the power of Congress to pass such statutes, are therefore strictly in point on the question of the power of the state to enact the statute under consideration.

One of the latest expressions of this Court upon the subject of the powers of Congress to enact such laws, is the case of *Northern Securities Co. vs. The United States*, the decision of which was handed down at the October, 1903, term of the Court. In that case the Court, after citing the numerous cases arising upon various phases of the law in which its constitutionality was invariably upheld, said:

"We will not encumber this opinion by extended extracts "from the former opinions of this Court. It is sufficient to "say that from the decisions in the above cases certain propo- "sitions are plainly deducible and embrace the present case. "These propositions are:

"That although the act of Congress known as the anti-"trust act has no reference to the mere manufacture or pro-"duction of articles or commodities within the limits of the "several states, it does embrace and declare to be illegal every "contract, combination, or conspiracy, in whatever form, of "whatever nature, and whoever may be parties to it, which "directly or necessarily operates in restraint of trade or com-"merce among the several states or with foreign nations;

"That the act is not limited to restraints of interstate and "international trade or commerce that are unreasonable in "their nature, but embraces all direct restraints imposed by "any combination, conspiracy, or monopoly upon such trade or "commerce;

"That railroad carriers engaged in interstate or interna-"tional trade or commerce are embraced by the act;

"That combinations, even among private manufacturers or "dealers, whereby interstate or international commerce is "restrained, are equally embraced by this act;

"That Congress has the power to establish rules by which "interstate and international commerce shall be governed, "and by the anti-trust act, has prescribed the rule of free "competition among those engaged in such commerce;

"That every combination or conspiracy which would extin-"guish competition between otherwise competing railroads "engaged in interstate trade or commerce, and which would "in that way restrain such trade or commerce, is made illegal "by the act;

"That the natural effect of competition is to increase com-"merce and an agreement whose direct effect is to prevent this "play of competition restrains instead of promoting trade and "commerce;

"That to vitiate a combination such as the act of Congress "condemns, it need not be shown that the combination, in fact, "results or will result, in a total suppression of trade or in a "complete monopoly, but it is only essential to show that, by "its necessary operation, it tends to restrain interstate or "international trade or commerce or tends to create a mon-"opoly in such trade or commerce and to deprive the public "of the advantages that flow from free competition;

"That the constitutional guaranty of liberty of contract "does not prevent Congress from prescribing the rule of free "competition, for those engaged in interstate and interna-"tional commerce; and

"That under its power to regulate commerce among the "several states and with foreign nations, Congress has author-"ity to enact the statute in question.

"No one, we assume, will deny that these propositions were "distinctly announced in the former decisions of this Court.

"They can not be ignored or their effect avoided by the intima-
"tion that the Court indulged in *obiter dicta*."

And it was said further:

"The means employed in respect of the combinations for-
"bidden by the anti-trust act, and which Congress deemed
"germane to the end to be accomplished, was to prescribe as a
"rule for interstate and international commerce (not for
"domestic commerce) that it should not be vexed by combina-
"tions, conspiracies, or monopolies which restrain commerce
"by destroying or restricting competition. We say that
"Congress has prescribed such a rule, because, in all the prior
"cases in this Court, the anti-trust act has been construed as
"forbidding any combination which, by its necessary opera-
"tion, destroys or restricts free competition among those en-
"gaged in interstate commerce; in other words, that to de-
"stroy or restrict free competition in interstate commerce was
"to restrain such commerce. Now, can this Court say that
"such a rule is prohibited by the Constitution or is not one
"that Congress could appropriately prescribe when exerting
"its power under the commerce clause of the Constitution?
"Whether the free operation of the normal laws of competi-
"tion is a wise and wholesome rule for trade and commerce
"is an economic question which this Court need not consider
"or determine. Undoubtedly, there are those who think that
"the general business interests and prosperity of the country
"will be best promoted if the rule of competition is not ap-
"plied. But there are others who believe that such a rule is
"more necessary in these days of enormous wealth than it
"ever was in any former period of our history. Be all this as
"it may, Congress has, in effect, recognized the rule of free
"competition by declaring illegal every combination or con-
"spiracy in restraint of interstate and international com-
"merce. As, in the judgment of Congress, the public con-
"venience and the general welfare will be best subserved when
"the natural laws of competition are left undisturbed, by
"those engaged in interstate commerce, and as Congress has
"embodied that rule in a statute, that must be, for all, the end
"of the matter, if this is to remain a government of laws, and
"not of men."

And further, quoting with approval from *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa., 173, 186, it was said:

" 'When competition is left free, individual error or folly
" 'will generally find a correction in the conduct of others.
" 'But here is a combination of all the companies operating in
" 'the Blossburg and Barclay mining regions, and controlling
" 'their entire productions. * * * In all such combina-

" 'tions where the purpose is injurious or unlawful, the gist of
" 'the offense is the conspiracy. Men can often do by the
" 'combination of many what, severally, no one could accom-
" 'plish, and even what, when done by one, would be innocent.
" '* * * There is a potency in numbers when combined
" 'which the law can not overlook, where injury is the con-
" 'sequence.' "

And further:

"The same principles were applied in *Arnot vs. Pittson & E.
"Coal Co.*, 68 N. Y., 558; 23 Am. Rep., 190, 194, which was the
"case of a combination of two coal companies in order to give
"one of them a monopoly of coal in a particular region, the
"Court of Appeals of New York holding that 'a combination to
"effect such a purpose is inimical to the interests of the public,
"and that all contracts designed to effect such an end are con-
"trary to public policy, and therefore illegal.' They were also
"applied by the Supreme Court of Ohio in *Central Ohio Salt
"Co. vs. Guthrie*, 35 Ohio State, 666, 672, which was the case of
"a combination among manufacturers of salt in a large salt-
"producing territory, the Court saying: 'It is no answer to
"say that competition in the salt trade was not in fact de-
"stroyed, or that the price of the commodity was not unreason-
"ably advanced. Courts will not stop to inquire as to the
"degree of injury inflicted upon the public; it is enough to
"know that the inevitable tendency of such contracts is in-
"jurious to the public.'

"So, in *Craft vs. McConoughy*, 79 Ill., 346, 350; 22 Am. Rep.,
"171, 174, which was the case of a combination among grain
"dealers by which competition was stifled, the Court saying:
" 'So long as competition was free, the interest of the public
"was safe. The laws of trade in connection with the rigor of
"competition, was all the guaranty the public required; but
"the secret combination created by the contract destroyed all
"competition, and created a monopoly against which the pub-
"lic interest had no protection.' Again, in *People ex rel. Pea-
"body vs. Chicago Gas Trust Co.*, 130 Ill., 269, 297; 8 L. R. A.,
"497, 506; 22 N. E., 798, 804, which involved the validity of the
"organization of a gas corporation which obtained a monopoly
"in the business of furnishing illuminating gas in the city of
"Chicago by buying the stock of four other gas companies, it
"was said: 'Of what avail is it that any number of gas com-
"panies, may be formed under the general incorporation law,
"if a giant trust company can be clothed with the power of
"buying up and holding stock and property of such companies,
"and, through the control thereby attained, can direct all
"their operations and weld them into one huge combination?'
"To the same effect are cases almost too numerous to be cited.

"But among those we refer to *Richardson vs. Buhl*, 77 Mich., "632; 6 L. R. A., 457; 43 N. W., 1102, which was the case of the "organization of a corporation in Connecticut to unite in one "corporation all the match manufacturers in the United "States, and thus to obtain control of the business of manufac- "turing matches, *Santa Clara Valley Mill & Lumber Co. vs. "Hayes*, 76 Cal., 387, 390; 18 Pac., 391, which was the case of a "combination among manufacturers of lumber, by which it "could control the business in certain localities; and *India "Bagging Asso. vs. Kock*, 14 La. Ann., 164, which was the case of "a combination among various commercial firms to control the "prices of bagging used by cotton planters. THE CASES "JUST CITED, IT IS TRUE, RELATE TO THE DOMESTIC "COMMERCE OF THE STATES. BUT THEY SERVE TO "SHOW THE AUTHORITY WHICH THE STATES POS- "SESS TO GUARD THE PUBLIC AGAINST COMBINA- "TIONS THAT REPRESS INDIVIDUAL ENTERPRISE "AND INTERFERE WITH THE OPERATION OF THE "NATURAL LAWS OF COMPETITION AMONG THOSE "ENGAGED IN TRADE WITHIN ITS LIMITS." (The capitals are ours.)

In *United States vs. Joint Traffic Association*, 171 U. S., 505, 571, the Court said:

"The cases cited by the respondents' counsel in regard to "the general constitutional right of the citizen to make con- "tracts relating to his lawful business are not inconsistent "with the existence of the power of Congress to prohibit con- "tracts of the nature involved in this case. The power to "regulate commerce has no limitation, other than those pre- "scribed in the Constitution. The power, however, does not "carry with it the right to destroy or impair those limitations "and guarantees which are also placed in the Constitution or "in any of the amendments to that instrument. *Monongahela "Navigation Co. vs. United States*, 148 U. S., 312, 336; *Interstate "Commerce Commission vs. Brimson*, 154 U. S., 447-479.

"Among these limitations and guarantees counsel refer to "those which provide that no person shall be deprived of life, "liberty or property without due process of law, and that "private property shall not be taken for public use without "just compensation. The latter limitation is, we think, plainly "irrelevant.

"As to the former, it is claimed that the citizen is deprived "of his liberty without due process of law when, by a general "statute, he is arbitrarily deprived of the right to make a con- "tract of the nature herein involved.

"The case of *Allgeyer vs. Louisiana*, 165 U. S., 578, is cited as "authority for the statement concerning the right to contract.

"In speaking of the meaning of the word 'liberty' as used in "the Fourteenth Amendment to the Constitution, it was said "in that case to include, among other things, the liberty of the "citizen to pursue any livelihood or vocation, and for that pur- "pose to enter into all contracts which might be proper, neces- "sary and essential to his carrying out those objects to a "successful conclusion.

"We do not impugn the correctness of that statement. "The citizen may have the right to make a proper (that is, a "lawful) contract, one which is also essential and necessary for "carrying out his lawful purposes. The question which arises "here is, whether the contract is a proper or lawful one, and "we have not advanced a step towards its solution by saying "that the citizen is protected by the Fifth, or any other amend- "ment, in his right to make proper contracts to enable him to "carry out his lawful purposes. We presume it will not be "contended that the Court meant in stating the right of the "citizen 'to pursue any livelihood or vocation to include "every means of obtaining a livelihood, whether it was lawful "or otherwise. Precisely how far a legislature can go in de- "claring a certain means of obtaining a livelihood unlawful, it "is unnecessary here to speak of. It will be conceded it has "power to make some kinds of vocations and some methods "of obtaining a livelihood unlawful, and in regard to those the "citizen would have no right to contract to carry them on.

"Congress may restrain individuals from making con- "tracts under certain circumstances and upon certain sub- "jects. *Frisbie vs. United States*, 157 U. S. 160.

"Notwithstanding the general liberty of contract which is "possessed by the citizen under the constitution, we find that "there are many kinds of contracts which, while not in them- "selves immoral or *mala in se*, may yet be prohibited by the "legislation of the states or, in certain cases, by Congress. "The question comes back whether the statute under review "is a legitimate exercise of the power of Congress over inter- "state commerce and a valid regulation thereof. The ques- "tion is, for us, one of power only, and not of policy. We "think the power exists in Congress, and that the statute is "therefore valid." (pp. 571-573)

The case of *Anderson vs. United States*, 171 U. S. 604, cited on behalf of plaintiffs in error in support of their contention, does not aid them. That case did not relate to the power of a state to suppress a combination tending to injure trade, but was decided solely on the ground that the combination there in question did not tend to restrain competition or

trade. The key-note of the decision, as found in the language of the Court on page 614, is as follows:

"It will be remembered that the association does no busi-"ness itself. Those who are members thereof compete among "themselves and with others who are not members, for the "purchase of the cattle while the association itself has noth-"ing to do with transportation nor with fixing the prices for "which cattle may be purchased or thereafter sold."

The same cannot be said of the combination in the case at bar. Here the combination did undertake to fix an arbitrary rate which all advertisers who patronized The Journal Company—who might, for anything that appears to the contrary, include all the advertisers in the city; and as to this large and indefinite class of advertisers, the parties to the combination did not compete among themselves, but it was one of the terms of the combination that any one of such class who advertised with one of the parties, must advertise with all and pay to all the same arbitrary increased rate.

It may be said that one tendency of this combination was to lower the price of advertising, by making The Journal Company reduce its rates. But it may also be said that its tendency was to raise the price of advertising by making advertisers of a class which might embrace every advertiser in the community, pay an increased rate in the three papers controlled by the parties to the combination. If the object was to force The Journal Company out of business, as counsel suggest it may have been, with this object accomplished the combination might readily extend their arbitrary rates to all advertisers.

In *People vs. Milk Exchange*, 145 N. Y. 267, which was an action brought by the attorney-general to vacate the charter of the Milk Exchange on the ground that it was an unlawful combination of the dealers in milk designed to stifle competition and control prices, the Court said:

"It may be claimed that the purpose of the combination "was to reduce the price of milk, and that it being an article "of food such reduction was not against public policy. But "the price was fixed for the benefit of the dealers, and not "the consumers, and the logical effect upon the trade of so "fixing the price by the combination was to paralyze the pro-

"duction and limit the supply, and thus leave the dealers in "a position to control the market, and at their option to "enhance the price to be paid by the consumers. This brings "the case within the condemnation of the authorities to which "we have referred." (p. 274)

And in the same case, quoting from *People vs. Sheldon*, the Court said:

"If agreements and combinations to prevent competition "in prices are or may be hurtful to trade, the only sure "remedy is to prohibit all agreements of that character. If "the validity of such an agreement was made to depend upon "actual proof of public prejudice or injury, it would be very "difficult in any case to establish the invalidity, although the "moral evidence might be very convincing."

In *Gibbs vs. McNeeley*, 118 Fed. Rep. 120, 60 L. A. R. 152, which was the case of a combination of shingle manufacturers, decided by the United States Circuit Court of Appeals for the Ninth Circuit, the Court said:

"There can be no doubt that at common law it is an unlaw- "ful combination in restraint of trade. It has the effect to "diminish production, abolish competition, and enhance "prices. Its illegality is not relieved by the fact that it was "induced by the keen competition and the unprofitable con- "dition of the shingle manufacturing business which existed "before it was entered into, or by the fact that the prices "fixed by the combination may have been reasonable. *Amer- "ican Biscuit & Mfg. Co. vs. Klotz*, 44 Fed. 721; *Richardson vs. "Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State ex rel. "Watson vs. Standard Oil Co.* 49 Ohio State 137, 15 L. R. A. 145, "30 N. E. 279; *People vs. Milk Exchange*, 145 N. Y. 267, 27 L. R. "A. 437m 39 N. E. 1062; *National Harrow Co. vs. Hench*, 39 "L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36; "*Cravens vs. Carter-Crume Co.*, 34 C. A. A. 479, 92 Fed. 479."

For an exhaustive review of cases in the state and federal courts, condemning as illegal combinations tending to the control of prices and the restriction of competition, see the opinion of Judge Taft in *United States vs. Addyston Pipe & Steel Co.*, 54 U. S. App., 723; 85 Fed. Rep., 271; 46 L. R. A., 122, and the same case as decided by this Court and reported in 175 U. S., 211.

It is the fixed policy of practically every state in the Union, as evidenced by statutes to that end, to prohibit all

combinations of independent interests, the tendency of which is to restrict competition or encourage monopoly, to the injury of trade and commerce. A number of these statutes are stated by way of illustration at the conclusion of our former brief filed herein.

III.

THE ENACTMENT OF SUCH STATUTES AS THE ONE IN QUESTION, FALLS STRICTLY WITHIN THE BROAD SCOPE OF THE POLICE POWERS OF THE STATE.

"The police power of the state may be broadly defined as "that inherent and plenary power which enables it to interdict "that which is prejudicial to the welfare of society. It is "aptly termed 'the law of overruling necessity.'"

Noyes on Intercorporate Relations, Sec. 409.
Lake View vs. Rose Hill Cemetery Co., 70 Ill., 191.

It extends not only over matters relating to the health, morals and safety of the public, but over whatever relates to the public comfort and convenience.

Lake Shore, &c. Ry. vs. Ohio, 173 U. S., 285.

As stated in Cooley's Constitutional Limitations (4th Edition), 713:

"The police powers of the state, in a comprehensive sense, "embrace its whole system of internal regulations by which "the state seeks not only to preserve the public order and to "prevent offenses against the state, but also to establish, for "the intercourse of citizens with citizens, those rules of good "manners and good neighborhood which are calculated to "prevent the conflict of rights and to insure to each the unin- "terrupted enjoyment of his own, so far as reasonably con- "sistent with a like enjoyment of rights by others."

The state, in the exercise of its police power, may enact "all such laws not in plain conflict with some provision of the state or federal constitutions, as may rightfully be deemed necessary and expedient for the safetly, health, morals, comfort and welfare of the people."

Knoxville Iron Co. vs. Harbison, 183, U. S., 20.

"Laws against combinations for the purpose of restricting "production, maintaining prices or suppressing competition, "have a relation to the end of all police regulations,—the com- "fort, welfare or safety of society. The preservation of com- "petition is clearly within the police power of the state. In "the absence of statutory provisions, the law leaves combina- "tions inimical to public policy as it finds them, and contents "itself with declining to recognize or enforce them. Statutes "reinforcing the common law, defining the rules of public "policy, and making criminal illegal combinations, are, un- "doubtedly, valid.

"The power of police, however, is not confined to providing "additional penalties for forming combinations previously un- "lawful. Any statute, having for its object the preservation "of competition and prohibiting all agreements or combina- "tions, the direct effect of the operation of which may be the "restriction of competition, is undoubtedly constitutional, al- "though it goes much further than the common law. The "wisdom or policy of its provisions is a matter for legislative "determination."

Noyes on Intercorporate Relations, Sec. 409, quoting numerous authorities in support of the text.

The 14th Amendment does not conflict with the exercise of the state's police power.

Davis vs. Massachusetts, 167 U. S., 43.

Jones vs. Brin, 165 U. S., 180.

Covington, etc. Turnpike vs. Sandford, 164 U. S., 592.

As said by Mr. Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27:

"Neither the amendment, broad and comprehensive as it is, "nor any other amendment, was designed to interfere with the "power of the state,—sometimes called its police power, to "prescribe regulations to promote the health, peace, morals, "education and good order of the people, *and to legislate so as "to increase the industries of the state, develop its resources and add "to its wealth and prosperity.*"

IV.

As argued above, it is not necessary, in order to uphold the validity of the statute, to demonstrate that combinations of

the character of the one in question, were illegal at common law; for the power of the legislature to prohibit combinations of this character in the interest of public policy, goes much further than the common law. But that such combinations were illegal at common law is established beyond question.

Olive vs. Van Patten, 7 Tex. Civ. App., 630, 25 S. W., 428.

Van Horn vs. Van Horn, 52 N. J. L., 284, 20 Atl., 485, 10 L. R. A., 184.

Jackson vs. Stanfield, 137 Ind., 592, 23 L. R. A., 588, 36 N. E., 345, 37 N. E., 14.

Old Dominion S. S. Co. vs. McKenna, 24 Blatchf., 244, 30 Fed., 48.

Casey vs. Cincinnati Typographical Union No. 3, 12 L. R. A., 193, 45 Fed., 135.

Toledo A. A. & N. M. R. Co. vs. Pennsylvania Co., 19 L. R. A., 387, 5 Inters. Com. Rep. 522, 54 Fed., 730.

Thomas vs. Cincinnati N. O. & T. P. R. Co., 4 Inters. Com. Rep., 788, 62 Fed., 803.

Hopkins vs. Oxley Stave Co., 28 C. C. A., 99, 49 U. S. App,, 709, 83 Fed., 912.

Walker vs. Cronin, 107 Mass., 55.

Barr vs. Trades Councils (N. J. Ch.), 30 Atl., Rep., 881.

Graham vs. St. Charles Street R'y Co., 47 La. Ann., 214, 27 L. R. A., 416.

Arthur vs. Oakes, 63 Fed. Rep., 323.

Ertz vs. Produce Exchange (Minn.), 81 N. W. Rep., 737.

Delz vs. Winfree, 80 Tex., 400.

Doremus vs. Hennessy, 176 Ill., 608, 43 L. R. A., 797.

Inter-Ocean Co. vs. Associated Press (Ill.), 56 N. E., 822.

Suppose, for illustration, one of the parties to the combination agreement should, in violation of the terms thereof, have accepted patrons of The Journal Company as advertisers at the old rates, and without requiring such patrons to advertise in the other two papers to the combination; will

it be contended that any cause of action would accrue against the party so violating the combination agreement in favor of the other parties thereto? Would not the Court, regardless of the statute, be compelled to say that the agreement was void and unenforceable because contrary to public policy? If the combination agreement could not be enforced as between the parties to the combination, because contrary to public policy, can it be contended that it was not within the power of the legislautre to prohibit such a combination?

V.

It is argued—apparently with great seriousness—that the effect of the statute as construed by the Court, is to prevent individual parties to the combination from saying upon what terms or conditions they will enter into business relations with others. Counsel, in their premises and particularly in their method of stating this proposition in its various forms, leave out of view the element of combination and of the express purpose to injure,—to say nothing of the natural tendency and effect of the combination to restrict competition and foster monopoly.

We have already shown that the freedom of contract guaranteed to the citizen by the 14th and 5th Amendments to the Constitution of the United States, does not interfere in the least with the power of the legislature—state or federal, as the case may be—to regulate or suppress combinations the tendency of which, regardless of their actual purpose, is to restrict competition or restrain trade.

That such was the nature of the combination in question as viewed by the state court is evident from the language of the decision upholding the validity of the statute as regards the power of the legislature to enact it. Thus, on page 252 of the decision (*State ex rel. Durner vs. Huegin*, 110 Wis.) the Court said:

"National and state legislatures have dealt with that sub-
"ject in many instances, in recent years, and uniformly with
"success so far as regards constitutional limitations,—with
"such success in fact that the man of learning must be recog-

"nized as one of courage who will attempt at this late day "to challenge legislative power in that regard on constitu- "tional grounds.

"The time seems past for that, as regards combinations of "individual independent interests, designed to remain inde- "pendent for most purposes, but to act in combination to con- "trol trade. By numerous decisions of the highest courts in "this country, the police power incident to sovereignty has "been held to be broad enough to permit the legislautre to "deal, by creating civil or criminal liability, or both, with all "combinations in restraint of trade which are void by com- "mon-law rules on grounds of public policy, and, within rea- "sonable limits to be set by courts in the light of constitu- "tional safe-guards, to say that things are contrary to public "policy not so before, to legislate against them, and to en- "force the legislative will by civil or criminal liability, or "both:—within the broad field indicated, to regulate or pro- "hibit any combination of the kind we are talking about, "formed for the purpose of restraining trade or disturbing "those natural business condtions, where every individual is "supposed to be free to contend with every other in the regu- "lar course of business. We are speaking here of independ- "ent interests concerting together for the purpose mentioned. "That must be kept in mind. These questions have been so "firmly settled that no court will now venture to do more "than follow what has been decided. Contracts that operate "merely in restraint of trade, such as is contended the one in "question was, even though unreasonable, were not action- "able at all at the common law. They were void, merely. The "courts would not enforce or give effect to them. But new "conditions have arisen creating new dangers, or intensifying "old ones that were once considered so trifling as to pass un- "noticed, calling for new restraints and new remedies. Who "can say that sovereign power has been so surrendered as to "be left incapable of dealing with that subject? Right or "wrong, those dangers have been considered so great, and "power to deal with them so ample, that legislation has gone "to the length we have indicated, making combinations to "stifle independent, individual competition, illegal and action- "able, civilly and criminally, all upon the broad ground that "legislative authority exists in the administration of the "police power, to regulate or prohibit those things which are "contrary to public policy by the rules of the common law; and "to go further and determine, in the light of new conditions, "what is detrimental to the public welfare, and to legislate "accordingly.

"On what has been said, the following of many authorities

"that might be cited are in point: *U. S. vs. Addyston P. & S.* "*Co.*, 85 Fed. Rep., 271; *U. S. vs. Trans-Missouri F. Asso.*, 166 "U. S., 290; *Gibbs vs. McNeeley*, 102 Fed. Rep., 594; *Nester vs.* "*Continental B. Co.*, 161 Pa. St., 473; *People vs. Sheldon*, 139 N. "Y., 251; *Jackson vs. Stanfield*, 137 Ind., 592; *People ex rel.* "*Morse vs. Nussbaum*, 32 Misc. (N. Y.), 1; *Leonard vs. Poole*, 114 "N. Y., 371; *People vs. Milk Exchange*, 145 N. Y., 267; *Ford vs.* "*Chicago M. S. Asso.*, 155 Ill., 166. The number of cases that "could be cited on this subject is so great that no attempt "has been made to do more than collect here a few that con- "tain pretty full discussions thereof. A study of them re- "veals the fact that the power of public opinion in favor of "preventing combinations to stifle individual freedom in bus- "iness and the sacrifice of those benefits, that are popularly "supposed to flow from free competition, has led to legisla- "tion in most of the states of the Union, as well as by the "Federal Congress, and that in but very few instances has "such an enactment met the bar of the constitution of "state or nation. A late work that treats of police powers, "sums up the subject here under discussion thus:

" 'It is believed that the constitutionality of none of the
" 'numerous anti-trust statutes has been successfully ques-
" 'tioned on the ground that they infringed the personal
" 'liberty of contract, in punishing civilly or criminally the
" 'entrance into a contract or combination in unreasonable re-
" 'straint of trade. That such contracts and combinations are
" 'void, independently of statute and at the common law—so
" 'far at least as to justify the courts in refusing to enforce
" 'them or in any other way to give the parties to them the aid
" 'of judicial process in protecting and enforcing the rights of
" 'parties, which grow out of such agreements,—has been too
" 'long the settled rule of law, to admit of any serious question
" 'now. And the power of the state to declare such contracts
" 'unlawful being conceded, it is completely within the discre-
" 'tion of the legislature to determine whether such unlawful
" 'contracts and combinations shall be simply ignored by the
" 'courts or the parties to them be subjected to criminal or
" 'civil liabilities.' *1 Tiedeman, State & Federal Control*, Sec. "112."

This aspect of the combination in question, as we have seen, leaves out of view entirely the actual purpose or intent of the combination, and deals only with its tendency and effect. And upon this ground alone the power of the legislature to prohibit such combinations, we submit, in view of the many decisions of this Court, is beyond question. But as previously indicated, the validity of the statute as construed by

the State Court, need not be rested alone on the ground that the combinations against which it is directed were void at common law because in restraint of trade and against public policy. Where the purpose to inflict malicious injury was present, such combinations besides being void as contracts, were made criminal by the common law. And as viewed by the State Court the combination in question besides being of a character to make it illegal and void at the common law possessed also the element of a malicious purpose to injure, which made it criminal. Thus, returning to the decision just quoted from, it was further said:

"Coming back to the question of whether the malicious in-"jury which the complaint charges against the defendants in "error is such an injury as the one named in the statute, it "seems that it makes little difference whether we view the "statute as merely declaratory of the common law or as in the "line of the numerous state statutes to which we have re-"ferred, condemning combinations in restraint of, or injurious "to, trade. It has the distinctive element of malice which "satisfies common law requirements of a malicious combina-"tion to injure, which is actionable for civil damages and "punishable as a criminal offense by common law rules, as we "shall see later."

State ex rel. Durner vs. Huegin, 110 Wis., pp. 254, 255.

And again:

"This Court has often held that an executed conspiracy to "inflict a malicious injury is actionable. * * * The great "weight of authority, almost all authority, is to the same "effect. We give a few citations: 1 Hawk. P. C., 446, Sec. 2; "*State vs. Stewart*, 59 Vt., 273; *Carew vs. Rutherford*, 106 Mass., "14; *Ertz vs. Produce Exchange*, 79 Minn., 140; *State vs. Bu-"chanan*, 5 Har. & J., 317; *Comm. vs. Waterman*, 122 Mass., 57; "*Farmers L. & T. Co. vs. N. P. R. Co.*, 60 Fed. Rep., 803; "*State vs. Norton*, 23 N. J. Law, 33; *State vs. Glidden*, 55 Conn., "46; *Sherry vs. Perkins*, 147 Mass., 212; *Smith vs. People*, 25 "Ill., 17; *Crump vs. Comm.*, 84 Va., 927; *Doremus vs. Hennessy*, "176 Ill., 608."

A very recent case is *Martell vs. White* (Mass.), decided March 1st, 1904, and reported in 69 N. E. Reporter, 1085, in which the Court discusses at considerable length the effect of the presence of a malicious purpose to injure, to render illegal

a combination which might otherwise be justifiable on the ground of competition.

In that case the granite manufacturers of a city formed an association, a by-law of which provided that any member having business transactions with any other manufacturer of the city not a member of the association in relation to granite should, for each such transaction, contribute to the association's expenses from $1 to $500; the amount to be determined by the association. By means of fines, from $10 to $100 on members for dealings with plaintiff, his business was ruined. Held, that though the association's object was competition, which is not illegal, the means—coercion by fines—were illegal, so that defendants were liable for the injury.

This case, it should be observed, did not involve the power of the legislature to prohibit or restrict combinations in restraint of competition, but merely the common law right of action for conspiracy. In that case also it was contended that the extra contributions to the association required of those members who might desire to deal with outsiders, as a condition of their membership in the association, was in effect a legitimate "differential" against such members desiring to deal with outsiders. The Court said:

"Acting under the by-laws, the association investigated "charges which were made against several of its members that "they had purchased granite from a party 'not a member' of "the association. The charges were proved, and, under the "section above quoted, it was voted that the offending parties " 'should respectively contribute to the funds of the associa- "tion' the sums named in the votes. These sums ranged from "$10 to $100. * * * The party 'not a member' was the "present plaintiff, and the members of the association knew it. "Most of the customers of the plaintiff were members of the "association, and, after these proceedings they declined to deal "with him. This action on their part was due to the course "of the association in compelling them to contribute as above "stated, and to their fear that a similar vote for contribution "would be passed, should they continue to trade with the "plaintiff. The jury might properly have found, also, that the "euphemistic expression 'shall contribute to the funds of the "association,' contained an idea which could be more tersely "and accurately expressed by the phrase 'shall pay a fine,' or "in other words, that the plain intent of the section was to

"provide for the imposition upon those who came within its "provisions of a penalty in the nature of a substantial fine. "The bill of exceptions recites that 'there was no evidence of "threats or intimidation practiced upon the plaintiff himself, "and the acts complained of were confined to the action of the "society upon its own members.' We understand this state- "ment to mean simply that the acts of the association con- "cerned only such of the plaintiff's customers as were mem- "bers, and that no pressure was brought to bear upon the "plaintiff, except such as fairly resulted from action upon his "customers. While it is true that the by-law was not directed "expressly against the plaintiff by name, still he belonged to "the class whose business it was intended to affect, and the "proceedings actually taken were based upon transactions "with him alone, and in that way were directed against his "business alone. It was the intention of the defendants to "withdraw his customers from him, if possible, by the imposi- "tion of fines upon them, with the knowledge that the result "would be a great loss to the plaintiff. The defendants must "be presumed to have intended the natural result of their acts. "Here, then, is a clear and deliberate interference with the "business of a person, with the intention of causing damage to "him, and ending in that result. The defendants combined "and conspired together to ruin the plaintiff in his business, "and they accomplished their purpose. In all this, have they "kept within lawful bounds? It is elemental that the unlaw- "fulness of a conspiracy may be found either in the end sought, "or the means to be used. If either is unlawful, within the "meaning of the term as applied to the subject, then the con- "spiracy is unlawful. It becomes necessary, therefore, to "examine into the nature of the conspiracy in this case, both "as to the object sought and the means used.

"The case presents one phase of a general subject which "gravely concerns the interests of the business world, and "which in recent years has demanded and received great con- "sideration in the courts and elsewhere. Much remains to be "done to clear the atmosphere, but some things, at least, ap- "pear to have been settled; and certainly at this stage of the "judicial inquiry it can not be necessary to enter upon a course "of reasoning or to cite authorities in support of the proposi- "tion that, while a person must submit to competition, he has "the right to be protected from malicious interference with "his business. The rule is well stated in *Walker vs. Cronin*, "107 Mass., 555, 564, in the following language: 'Everyone has "a right to enjoy the fruits and advantages of his own enter- "prise, industry, skill, and credit. He has no right to be pro- "tected against competition, but he has a right to be free from

"malicious and wanton interference, disturbance, or annoy-
"ance. If disturbance or loss come as a result of competition,
"or the exercise of like rights by others, it is *damnum absque*
"*injuria*, unless some superior right by contract or otherwise
"is interfered with. But if it comes from the merely wanton
"or malicious acts of others, without the justification of com-
"petition or the service of any interest or lawful purpose, it
"then stands upon a different footing.' In a case like this,
"where the injury is intentionally inflicted, the crucial ques-
"tion is whether there is justifiable cause for the act. If the
"injury be inflicted without just cause or excuse, then it is
"actionable. Bowen, L. J., in *Mogul Steamship Co. vs. McGregor*,
"23 Q. B. D., 598, 613; *Plant vs. Woods*, 176 Mass., 492; 57 N. E.,
"1011; 51 L. R. A., 339; 79 Am. St. Rep., 330. The justification
"must be as broad as the act, and must cover not only the
"motive and the purpose, or in other words, the object sought,
"but also the means used."

The entire decision is instructive, as indicative of the extent to which competition may be urged as a justification for injury to the business of others on general principles of trade and independently of statute.

The case of *Delz vs. Winfree*, 80 Tex. Sup. Ct., 400, 16 S. W., 111, relied upon by counsel for plaintiffs in error, it seems to us is squarely against their contention. In that case it appeared that the defendants, members of two different firms, engaged in buying live animals, thereafter to be slaughtered and sold as butcher's meat, did combine, confederate and conspire with each other and with a butcher, not to sell the petitioner, for cash, live animals or slaughtered meat for the prosecution of his business. That each of said firms subsequently refused to sell the petitioner live animals when offered their own price in money, which he—the petitioner—then offered to pay them. That by reason of such combination against the plaintiff, he was compelled to close up and discontinue his business.

It was held that the complaint stated a good cause of action against the defendants, for malicious injury to the business of the plaintiff. The Court said:

"A person has an absolute right to refuse to have busi-
"ness relations with any person whomsoever, whether the
"refusal is based upon reason or is the result of whim,

"caprice, prejudice or malice, and there is no law which "forces a man to part with his title to his property. THE "PRIVILEGE HERE ASSERTED MUST BE LIMITED, "HOWEVER, TO THE INDIVIDUAL ACTION OF THE "PARTY WHO ASSERTS THE RIGHT. IT IS NOT "EQUALLY TRUE THAT ONE PERSON MAY FROM "SUCH MOTIVES INFLUENCE ANOTHER PERSON TO "DO THE SAME THING." (The capitals are ours.)

Counsel for plaintiffs in error, Huegin and Aaikens, admit that the law as above set forth, is correct. (Brief on Re-Argument, p. 68.)

We do not understand how they can successfully stand upon this proposition. It is clear that by the combination each of the parties thereto intended to induce and did induce the others not to have dealings with any of the customers of The Journal except upon conditions which were practically prohibitive of such customers continuing their relations with The Journal if it was necessary—as is alleged in the complaint—for them to advertise in two or more papers. We contend that the undertaking of each of the parties to the combination, not to have any dealings with anyone who should persist in advertising in The Journal, except at the rates fixed by the combination, was intended to be and was in fact, an inducement to the other parties to the combination to do the same thing. By the agreement the Sentinel induced the News and the Wisconsin to refrain from dealing with advertisers who patronized the Journal; the News did the same thing with reference to the Wisconsin and the Sentinel, and the Wisconsin did the same thing with reference to the Sentinel and the News. Therefore, if we apply the test laid down in *Delz vs. Winfree*, accepted by counsel as satisfactory, to the combination in the case at bar, it must be held illegal, independent of the statute.

VI.

It is also contended that any construction of the statute which would make it applicable to the combination in question, would make an ordinary partnership or joint business venture illegal.

As partnerships and every joint business undertaking which deserves to be encouraged by law, have for their primary object the benefit and advantage of the parties and not the injury of others, it is quite clear that they do not come either within the terms of the statute or within the definition thereof as given by the Supreme Court of Wisconsin.

As far as the statute as construed by the Court can be said to go in restraint of co-operation in business, is that where independent interests designing to remain independent for most purposes, combine for the purpose of controlling prices and stifling competition, and moreover for the specific purpose of injuring the business of another, such combinations are illegal. The distinction between the legitimate co-operation of labor or capital for the mutual benefit of the parties, and a combination between independent interests to stifle competition, control prices and destroy specific competitors, however much it may be confused by ingenious argument, as a practical question is not ordinarily difficult to determine. The claim that statutes of this character, condemning combinations in restraint of competition and trade, can not be enforced without destroying all partnership and co-operative business enterprise, is a well-worn contention, and one which we believe has been made in nearly every case of this kind.

The policy of the common law, which is the basis of all such statutes, is thus stated by Taft, Circuit Judge, in *United States vs. Addyston Pipe & Steel Co.*, 54 U. S. App., 723; 46 L. R. A., 122, at page 129 of the latter report:

"The inhibition against restraints of trade at common law "seems at first to have had no exceptions. See language of "Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a "time it became apparent to the people and the courts that it "was in the interest of trade that certain covenants in re- "straint of trade should be enforced. It was of importance, "as an incentive to industry and honest dealing in trade that, "after a man had built up a business with an extensive good- "will he should be able to sell his business and good-will to "the best advantage, and he could not do so unless he could "bind himself by an enforceable contract not to engage in the

"same business in such a way as to prevent injury to that "which he was about to sell. It was equally for the good of "the public and trade, when partners dissolved, and one took "the business, or they divided the business, that each partner "might bind himself not to do anything in trade thereafter "which would derogate from his grant of the interest con-"veyed to his former partner. Again, when two men became "partners in a business, although their union might reduce "competition, this effect was only an incident to the main pur-"pose of a union of their capital, enterprise and energy to "carry on a successful business, and one useful to the com-"munity. Restrictions in the articles of partnership upon the "business activity of the members, with a view of securing "their entire effort in the common enterprise, were, of course, "only ancillary to the main end of the union, and were to be "encouraged."

It is sufficient to say that the statute has not yet been applied to the case of a partnership or any legitimate co-operative business enterprise, and unless the construction which has thus far been placed upon it be radically changed, it is safe to say that it cannot be so applied. This Court doubtless will not undertake to anticipate an erroneous or mistaken application of the statute by declaring it unconstitutional in advance of such application.

It is the disposition of courts to uphold, rather than destroy, statutes.

To quote the head notes in a recent case,—*State vs. Smiley* (Supreme Court of Kansas), 69 Pacific Reporter, 199:

"The general language of statutes will be limited to "such persons and subjects as it is reasonable to presume the "legislature intended it should apply.

"Objections to the constitutional validity of statutes can "be made only by those to whom the enactment applies and "against whom attempts to enforce it are made."

VII.

It is also claimed with some apparent seriousness, that the statute is unconstitutional because it denies to plaintiffs in error the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States. As the statute is general in its terms and is made to apply to all

alike who come within its provisions, we are unable to perceive any force whatever in this contention.

In conclusion, we submit that the statute is moderate in its terms and well within the unquestionable scope of the police powers of the state; that its construction by the Supreme Court of the state in its application to the case of plaintiffs in error was conservative, and limited, rather than extended, the general terms of the statute. And finally, that the case of plaintiffs in error in the manner in which it came before the Court was well within the statute as construed by the Court, and that the judgment should be confirmed.

LAFAYETTE M. STURDEVANT,
Attorney-General of Wisconsin.

JAMES G. FLANDERS,
Of Counsel, for defendant in error, the State of Wisconsin.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1902.

MELVIN A. HOYT,
Plaintiff in Error

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

In April, 1900, at the city of Milwaukee, the plaintiff in error Hoyt was engaged in the publication of a daily newspaper called the Milwaukee Daily News. At the same city plaintiff in error in number 297, Aikens was then engaged in the publication of a daily paper known as the Evening Wisconsin; and plaintiff in error in number 298, Huegin at the same city then was engaged in publishing another daily paper known as The Milwaukee Sentinel; contemporaneously with such publications there was published in Milwaukee still another daily paper known as the Milwaukee Journal.

These several publications continuing, on the 21st day of October, 1901, the district attorney of Milwaukee county filed in the Municipal Court of that county, being a court of criminal juris-

diction, an information the equivalent of a criminal indictment under the laws of Wisconsin, against Hoyt, Aikens and Huegin jointly, as such publishers, alleging a conspiracy between them to injure the business of the Journal Company, publisher of the Milwaukee Journal, and as well to the injury of its officers and stockholders. (Transcript 10.)

The filing of the information was followed by the issuance of a warrant for the arrest of Hoyt, Aikens and Huegin by virtue of which they were severally arrested and brought before the court on October 21, 1901. (Transcript 9.)

On that day plaintiff in error Hoyt filed his demurrer to the information as not stating a criminal offense and as violative of the provisions of article XIV of the amendments to the Constitution of the United States. (Transcript 14.) Afterward on November 20, 1901, the issue joined by such demurrer came on for hearing and argument and was then argued by counsel for the State and for Hoyt, when the demurrer was overruled, to which order and ruling plaintiff in error then and there duly excepted, which exceptions were reduced to writing and allowed by the court.

Plaintiff in error thereupon signified to the court that he stood upon his demurrer and did not desire to plead over. Upon such intimation of the accused, the court proceeded to find him guilty as charged and sentenced and adjudged that he pay a fine of $150, together with $67.10 costs of the proceedings, and that in default of such payment he be committed to the House of Correction for Milwaukee County until such fine and costs were paid, not, however, in all exceeding thirty days. (Transcript 16.) Thereupon the plaintiff in error tendered his

exceptions to the findings and judgment of conviction, which exceptions were reduced to writing and allowed by the court. (Transcript 16.)

Thereupon a stay of proceedings upon this judgment was granted upon the execution of a bond for that purpose in the sum of $500, which bond was executed and approved on that day; the stay to continue until the remittitur in the cause should be returned from the Supreme Court of the State. (Transcript 26.)

On November 25, 1901, a writ of error on the application of Hoyt was duly issued by the Supreme Court of Wisconsin to the Municipal Court of Milwaukee County, returnable on the Tuesday before the second Wednesday of January, 1902, and served the next day, whereby the judgment and record in this cause were removed to the Supreme Court of Wisconsin to be reviewed in that court. (Transcript 24.) Accordingly on December 4, 1901, the clerk of the Municipal Court made return in writing of a certified copy of the record and judgment in this cause to the Supreme Court of Wisconsin in conformity with law and the rules of that court.

Afterward, the cause having been duly submitted, on the 18th day of February, 1902, the Supreme Court of Wisconsin rendered its decision and final judgment in the case of Mr. Hoyt (and as well in the cases of Messrs. Aikens and Huegin), in all respects affirming the rulings, findings and judgment of the Municipal Court of Milwaukee County, with costs of suit. (Transcript 63.) A copy of the opinion of the court is found, pp. 65–6 Transcript.

As possibly the opinion of the court on *habeas corpus* sued

out before judgment should have been included in the record, for convenience it is printed as an appendix to this brief.

A writ of error from this court to the Supreme Court of Wisconsin duly allowed by the chief justice of that court and signed by the clerk of the Circuit Court of the United States for the Western District of Wisconsin was duly issued and served on March 11, A. D. 1902 (Transcript 1); and on the same day a citation to the defendant in error signed by the chief justice of the Supreme Court of the State of Wisconsin was duly issued and served upon the attorney-general of the state (Transcript 19), and a supersedeas bond in behalf of Mr. Hoyt for $1,000 was duly executed, and approved by the chief justice and filed in the office of the clerk of the Supreme Court of Wisconsin, and a stay of proceedings ordered. (Transcript 19–5.) With the writ of error from this court to the Supreme Court of the State of Wisconsin and duly served upon the clerk of that court, the plaintiff in error filed the following assignments of error, to wit:

(1) The Supreme Court of the State of Wisconsin erred in affirming the judgment of the Municipal Court of Milwaukee County in the State of Wisconsin, which overruled by its judgment the demurrer filed by the said Melvin A. Hoyt to the information filed in the said Municipal Court, and in holding that the said information stated a criminal offense.

(2) The Supreme Court of the State of Wisconsin erred in affirming by its judgment the findings and judgment of the said Municipal Court of the County of Milwaukee, in said State, and in adjudging the said Melvin A. Hoyt, plaintiff in error, guilty of a conspiracy as charged in the information filed in said last

mentioned court, and in imposing a fine and sentence in pursuance thereof on him, the said Melvin A. Hoyt.

(3) And the said Supreme Court of the State of Wisconsin further erred in affirming the judgment of the said Municipal Court in holding and adjudging that all or any of the several acts charged in the said information to have been performed or done by the said Melvin A. Hoyt, or agreed to be done or performed by him, singly or in combination with Andrew J. Aikens and Albert Huegin, the said co-plaintiffs in error with the said Melvin A. Hoyt, or either of them, were criminal, unlawful or prohibited combinations.

(4) That the said Supreme Court of the State of Wisconsin further erred in its said judgment by holding and adjudging that the provisions of Article XIV of the Amendments of the Constitution of the United States, though a construction of said article XIV was thereby necessarily drawn in question in such adjudication, were not a protection in the law of the said Melvin A. Hoyt against any combination, act or acts charged in said information to have been done or agreed to be done by the said Melvin A. Hoyt, either singly or in combination with the said Andrew J. Aikens and Albert Huegin, or either of them, whereby the said Melvin A. Hoyt was deprived of his rights, privileges and immunities secured to him by the said Article XIV of the Amendments of the Constitution of the United States, and of the liberty, property and due process of law secured to him as a citizen of the United States and of the State of Wisconsin.

(5) And the said Supreme Court of the State of Wisconsin further erred in holding and adjudging that section 4466a of Sanborn & Berryman's edition of the Revised Statutes of the

State of Wisconsin for the year 1898, though necessarily drawn in question in the aforesaid judgment of the said Supreme Court of the State of Wisconsin, was valid, and that the same was not repugnant to the Constitution of the United States, and especially to the said article XIV of the amendments to said constitution, and in sustaining the validity of said statute, and by holding as it did hold, a valid enactment; whereby the said Melvin A. Hoyt was deprived of his rights, privileges and immunities, as a citizen of the United States and of the State of Wisconsin, and of the liberty, property and due process of law secured to him by the said article XIV of the amendments to the Constitution of the United States.

And the said Melvin A. Hoyt prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment. (Transcript 21.)

The following is Section 4466a, R. S. of Wisconsin for A. D. 1898:

"BOYCOTTING, STRIKES AND LOCKOUTS.

"Injury to Business: Restraint of Will.—Section 4466a. "Any two or more persons who shall combine, associate, agree, "mutually undertake or concert together for the purpose of "wilfully or maliciously injuring another in his reputation, "trade, business or profession by any means whatsoever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

The assignment of errors filed under Rule X of this court

embraces substantially the same errors as those assigned in the court below. (Transcript 67.)

The information filed against the plaintiff in error follows the language of the Revised Statutes of Wisconsin, Section 4466a, excepting that the conspiracy and overt acts charged are preceded by the words "unlawfully and with the intent" which do not appear in the statute, and that the words "wilfully and maliciously" are used instead of "wilfully or." The information begins with the technical averment of a conspiracy between Hoyt, Aikens and Huegin at Milwaukee on April 5, 1900, "unlawfully, for the purpose and with the intent" then and there wilfully and maliciously of injuring the Journal Company and certain persons named as publishers of the Milwaukee Journal.

This averment is followed by a statement of facts in the nature of inducement—as (*a*) That said Journal Company is a corporation existing under the laws of Wisconsin and the owner and publisher of a daily newspaper and advertising medium called the Milwaukee Journal, published at said city of Milwaukee, and having a large circulation as such throughout the State of Wisconsin and elsewhere, and that its business was to print and sell such paper and to solicit, print and publish in said paper for hire, advertisements; and that at the time referred to, said company had a large number of advertisers and patrons of said paper and that a large proportion of its revenue was derived from advertising; that Nieman, Boyd and Schaum were stockholders in said paper and financially interested in its success; that Nieman was editor, Boyd manager and Schaum treasurer.

(*b*) That advertising rates which newspapers are entitled to charge depend and are based upon the circulation thereof, and

that early in the year 1900, said Journal Company established a new rate for advertising in the Journal, based upon its circulation, and gave notice to its patrons of such increased rate, which was about twenty-five per cent in excess of that charged by the same paper for the year 1899.

(c) That at the periods mentioned defendant Aikens was the publisher of the Evening Wisconsin, a daily published in said city, having an extensive circulation and devoted to the same purposes as those of the Journal, and that defendant Huegin during the like period was publisher of The Milwaukee Sentinel, a daily at said city, of extensive circulation and devoted to like purposes as the other papers named; and that defendant Hoyt during the same period was publisher of the Milwaukee Daily News at said city, devoted to the same purposes as the other papers named.

It is then charged as overt acts in execution of the alleged conspiracy that on the date and at the place aforesaid "for the purpose and with the intent then and there, of wilfully, maliciously and unlawfully injuring said Journal Company in its trade and business" and its officers and stockholders, Hoyt, Aikens and Huegin—

(1) Did confederate and agree that if any merchant or other person or corporation advertising or proposing to advertise in said Milwaukee Journal should pay or agree to pay to said Journal Company the said increased rate for advertising therein established by it, that in such case the person or corporation so advertising in the said Journal or proposing to so advertise therein should not be permitted to advertise in either of the said other three papers, to wit, the Sentinel, Evening Wisconsin or Daily News unless such merchant, person or corporation should

advertise in each of the said three papers and pay to each of them a corresponding increase over the rates theretofore charged by such three other papers respectively, to wit, about twenty-five per cent in excess of what said three papers respectively had theretofore charged for advertising; but in case any merchant, person or corporation should refuse to pay said Journal Company the said increased rate established by it for advertising in the Journal, that then and in that case such merchant, person or corporation so refusing should be at liberty to advertise in any or all of the other of said three papers at the rates which had theretofore been charged by said other three papers respectively.

(2) That the plaintiff in error, in pursuance of said last named agreement and understanding, notified the advertising patrons of the Journal of the making thereof; and that many of the advertising patrons of the Journal were thereby induced to withdraw their advertisements therefrom, greatly to the injury of the trade and business of the said Journal Company, its officers and stockholders.

(3) That in pursuance of said last named agreement the plaintiffs in error refused to allow the advertisements of divers merchants and other persons to be inserted in either of said three papers, the Sentinel, Evening Wisconsin or Daily News, and prevented the advertisements of divers merchants or other persons from appearing in all or any of said last three named newspapers, because such merchants or other persons so prevented had paid or agreed to pay said Journal Company the said increased rate established by it; and that by reason of said last named combination many merchants in Milwaukee and elsewhere were prevented from advertising in the Journal, greatly to the

injury of the business and trade of said Journal Company, its officers and stockholders, contrary to the statute in such case made and provided, etc.

II.

I have taken the foregoing statement from an incomplete draft of a brief prepared by my predecessor in this case, Mr. N. S. Murphey of Milwaukee. Mr. Murphey was an able, accurate and learned lawyer, for many years a partner of Senator Matthew Hale Carpenter, of Wisconsin. At the time of his death he was one of the leaders of the bar in the city where he had so long resided.

There would seem to be two questions arising under the Federal Constitution, clearly raised by the assignments of error and necessarily involved in the determination of this case.

First, is the right to do that with which plaintiff in error is charged in the information, secured by the Fourteenth Amendment? Second, if the first question be answered in the negative and the power of a state to interdict such conduct be affirmed, is the statute of Wisconsin in question a constitutional exercise of that power?

It is quite obvious that these two questions are not identical. For instance, some right to contract is undoubtedly secured by the Fourteenth Amendment. If a state should by legislative act prohibit all exercise of this right, and one criminally charged under such an act should assert its invalidity, it would be no answer to this contention to say that the legislature had constitutional authority to prohibit that kind of contract for making which defendant was prosecuted, and therefore it was immaterial

whether their attempted legislation transcended that power or not, as it must be held, *pro tanto*, valid.

The right to property is secured under this amendment. Suppose some state, acting under an impulse toward communism, should provide by law that no one, under penalty prescribed, should acquire or hold more than $20,000 in value of property of any kind. Thereupon a man is prosecuted under this act and urges its invalidity. But the property in question is intoxicating liquors, against which the state has power to legislate. In the absence of definite legislation as to this class of property, a general law in the terms indicated must be condemned, although the question was raised in respect of a holding of property that the legislature might have prohibited.

Connolly v. *Union, etc., Co.*, 22 Sup. Ct. Rep. 431, furnishes an illustration of this general proposition.

An effort will be made to answer both of these questions; the first in the affirmative, thus establishing the constitutional right of plaintiff in error, under the Fourteenth Amendment, to do that for which he was sentenced; the second in the negative, thus denying the power of the legislature of Wisconsin to pass the act in controversy, whatever may be thought of the first question. If the court is satisfied that either contention is sound, the judgment below must be reversed.

It seems necessary to examine the law somewhat to see whether at common law, and irrespective of statute, conduct like that of plaintiff in error amounts to an illegal combination or conspiracy. If it does, then no doubt a state may lawfully interdict it; if it does not, it is not necessarily true that the state may not prohibit it; but *prima facie*, this should be assumed in favor of

liberty. It is necessary therefore, secondly, to examine the decisions to ascertain the nature and extent of those rights to liberty guaranteed by the Fourteenth Amendment, so as to ascertain whether they extend so far as to protect the individual against all interference by the state, with such combination and competitive conduct as that charged in the information.

These topics call for all the citations required in this discussion.

The remaining and third question will be examined in the light of the authorities thus collected under the first two propositions, in an effort to show that the statute of Wisconsin as construed by the Supreme Court of that state is contrary to the Fourteenth Amendment; that, conceding *arguendo*, the power of the state to forbid that with which plaintiff in error stands charged, this statute is not a legitimate exercise of that power.

It should be said by way of preface that the plaintiff in error was originally arrested on a warrant issued from the police court in Milwaukee on complaint there filed. (Transcript 7.) On *habeas corpus*, the Circuit Court of Milwaukee County discharged plaintiff in error on the ground that the complaint showed no offense, thus sustaining, as I am informed, the contentions now urged. From the judgment of the Circuit Court an appeal was prosecuted to the Supreme Court and in that case the court promulgated its views *in extenso*, referring to that opinion briefly in rendering the judgment to reverse which this writ is prosecuted.

It is the opinion in that case, reported in 110 Wis. 189, that is appended to this argument.

I.

Fortunately this is not a labor controversy. There seems to be in all discussion of such questions something too much of bitterness and extravagance of assertion, from the just imputation of which the bench is not altogether free. (*v.* 116 Fed. Rep. 510–520 for marked examples of this.)

In this case the publishers of four newspapers in the city of Milwaukee got into a controversy over, apparently, that perennial apple of discord in the fraternity—the question of circulation. The Journal ostentatiously announced such an enormous increase in its circulation that it proposed to increase its rates twenty-five per cent. Thereupon the publishers of three other daily papers, the Sentinel, the Wisconsin and the News, agreed that if any one advertised in the Journal at these rates they would not receive his advertisement in their papers unless he paid them a similar increase in their rates and advertised in all their papers. The effect of this was obviously to discourage advertising in the Journal and thus promote the advertising patronage of the other papers. The learned court below does not seem to recognize this; but it is quite apparent, from the fact that the information charges that thus many merchants in Milwaukee and elsewhere were prevented from advertising in the Journal. (Transcript 13.) They would naturally be so deterred only by a desire or with the expectation of advertising in the other papers. And as the advertising in Milwaukee is limited, and as people must advertise, it is quite apparent, without engaging in any refined and abstruse calculations on the subject, that the less the Journal got, the more would fall to the other papers.

Is there anything illegal in such an arrangement at common law? Clearly not. It was entered into by those engaged in a private and not a public business. Those party to it were not numerous; its purpose was not illegal; it did not tend to raise the prices of advertising but rather the contrary. Any party to it had the right to refuse the advertisement of any one for a good reason, for a bad reason, for no reason, and to exact for its insertion whatever he saw fit. All acting together had a similar right. They were neither threatening, molesting nor dictating to the publishers of the Journal. They simply announced to the public the terms on which they would do business.

Advertising is in the nature of personal service. It is not the sale of goods nor even the sale of space. A publisher agrees to print and circulate an advertisement in much the same way that a bill poster agrees to post advertisements on his billboards. It is in law a contract for work and labor—possibly materials. No reason is perceived why the right of combination does not exist as between those rendering this service to the same extent that it might in other classes who work. But it is not every combination between those engaged in trade that is regarded as in restraint of trade or unlawful, much less criminal. The cases on this subject are numerous. I do not expect to comment on them all, but shall refer to enough to put this court in possession of all the authorities on the subject.

In this discussion the subject of conspiracy naturally suggests itself; for it is under that head that most of the authorities range themselves, though, singularly enough, if a modern investigator desires, in this country, to investigate the law of criminal

conspiracy, he will find the subject discussed with the greatest fullness in cases in chancery.

I premise any reference to cases with the general statement that at common law originally there was no such thing as a criminal conspiracy except in respect of some unlawful combination or agreement to procure the prosecution or indictment of an innocent person.

1 Chitty, Cr. Law, 1138.

The extent to which the law has progressed on this subject is remarkable and indeed rather alarming.

In a case hereafter cited the general subject was clearly treated; and I quote an extract for a lucid and compact statement as to the nature of conspiracy, either civil or criminal.

"I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose. I will endeavor briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is *wrongful and* harmful toward another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber* v. *Lesiter* (1). I quote as a very instruc-

tive definition of a conspiracy the words of a great lawyer, Willes, J., in *Mulcahy* v. *Reg.* (2), in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating, J., and Pigott B., which was adopted by this House: 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. * * * The number and compact give weight and cause danger.'

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present."

Lord Brampton in *Quinn* v. *Leathem*, App. Cases, Law Reports (1901) 495–528.

It is to be noted in passing that in the definition given by the learned law lord, an alternative definition is "to do that which is *wrongful and* harmful toward another person." But the statute of Wisconsin, omitting the word "wrongfully," disregards the element of legal wrong and makes the combination to do injury or harm the gist of the offense.

The law of England on this subject is reviewed somewhat in the opinion below, and the learned justice, writing for the court, expresses himself thus on that subject:

"The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine, to monopolize trade and render combinations successful by the malicious destruction of the business of competitors, is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time

of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law."

And thereupon the learned justice proceeds to extract some consolation from the opinion at the circuit in *Farmers L. & T. Co.* v. *N. P. R. R.*, 60 Fed. Rep. 803, quoting a paragraph therefrom.

As a distinguished member of this court has recently taken public notice of Mr. Dooley's celebrated dictum that the court follows the election returns, I may be pardoned for suggesting that the questions involved in this record are questions of law; that they must be determined, not upon those general considerations which might appeal to a legislature or secure popular approval, but in accordance with what this court conceives to be settled rules of constitutional law. And I can but regard the language quoted as indicative of a disposition on the part of the court below to disregard these salutary limitations upon judicial action.

The citation made by the learned justice would have been more persuasive had not the case cited been reversed in the Court of Appeals and the views of the Circuit Court expressed in the quotation made, explicitly repudiated by Mr. Justice Harlan in delivering the opinion of the reviewing court. That case will be discussed hereafter. I pass now to some citation of the recent cases in England.

It is not intended to comment at any length upon the various opinions in the case of *Mogul Steamship Co.* v. *McGregor*, but it may not be improper to call the attention of the court to some observations by Lord Coleridge, before whom that case was origi-

nally heard. 59 Law Times Reports, 514; S. C. Appeal Cases 25 (1892).

In the course of his opinion, he said:

"It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas, on condition of those customers dealing with them, and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question."

Again:

"It must be remembered that all trade is, and must be, in a sense selfish. Trade not being infinite—nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament in medicine, in engineering, men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business."

The opinions of Lord Herschell and Lord Coleridge, both of whom were known to some, at least, of the members of this bench, are entitled to and will no doubt, receive attentive consideration; and the extract just made well illustrates the lettered and attractive style of the versatile and gifted chief justice.

When this case got into the House of Lords the question was elaborately discussed and it may be that some of the lords regarded this contract as one that was unlawful or illegal in the sense of being non-enforceable, but not actionable or criminal. The parties in that combination being common carriers, I think

probably a different principle applies from what is applicable to the case in hand. But on the general subject as to the right of free competition, I desire to quote a few sensible words from the opinion of Lord Morris.

"Now as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise. I can not see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncracies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."

Mogul Steamship Co. v. *McGregor*, 66 Law Times Rep 1-9.

The great case of *Allen* v. *Flood* can hardly be passed by in this discussion although it is rather difficult, apparently, to determine exactly what was decided in that case and it is perhaps not altogether clear how the same great tribunal has since regarded what was there actually determined. *Allen* v. *Flood*, 77 Law Times Reports, 717; S. C. App. Cases 1 (1898).

It seems to have been held that to induce a master to discharge a servant, if the discharge does not involve a breach of contract, or to induce a person not to employ a servant, though

done maliciously and resulting in injury to the servant, does not give him any cause of action. All previous authorities on this vexed question are carefully examined and reviewed, including the case of *Mogul Steamship Co.* v. *McGregor*, Appeal Cases, 1892, 25, S. C. 66 Law Times Rep. 1, just cited.

Lord Herschell wrote one of the prevailing opinions in this case and in the course of it laid down a very important principle, of which judges sometimes seem to be unmindful. He said:

"I am not behind my honorable and learned friend in the desire to preserve individual liberty, but I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

Lord McNaghten concurring, among other things, said:

"Suppose a person of position takes away his custom from a country tradesman in a small village, merely to injure him on account of some fancied grievance not connected with their dealing in the way of buying or selling, no one, I think, would suggest that there could be any remedy at law in any of these cases. But suppose a customer, not content with taking his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend not to employ the tradesman any more; neither one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker may now and then, I fancy, be plaintiff in a very interesting suit. The truth is that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safe-guards are to be found in self-interest and public opinion. Much more harm than good can be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought, is in itself innocent or mutual in character, and one which anybody may do or leave undone

without fear of legal consequences. * * * I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of *oppressive combination*, the vice of which seems to me to depend on considerations which are conspicuously absent in the present case."

Lord Shand recognized the distinction between a malicious purpose to ruin or injure, animating a combination of different persons, and a combination in pursuit of a legitimate trade advantage, and referring to the suggestion of counsel that a disapproval of the law laid down in a certain case, would be attended with dangerous consequences, as removing a certain amount of restraint, introduced by that case; he said:

"But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort, it should be removed. And if the force of combination should be harshly or oppressively used—if it should be used under circumstances in which right-minded men would deplore its use—it must be observed that those against whom combination is so employed, have precisely the same liberty of action for resisting oppressive measures, and for causing those who use them to desist from that course of action."

Lord James, of Hereford, offered some valuable observations, as follows:

"But I am aware that it was urged at the bar that even if the views which I have expressed to your lordships be correct, there is an exception from general principles in favor of those, whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words, 'interfered with,' in their legal sense, should be given.

Every man's business is liable to be 'interfered with' by the action of another and yet no action lies for such interference. Competition represents 'interference' and yet it is in the inter-

est of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere,' with it.

If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow. Of course, the conduct of the boilermakers in the case before your lordships amounted to an interference with the plaintiff's business, and yet, as has been pointed out, it is not said that an action lies against them. Every organizer of a strike in order to obtain higher wages 'interferes with' the employer carrying on his business; also every member of an employers' federation, who persuades his co-employer to lock out his workmen must 'interfere with' those workmen. Yet I do not think it would be argued that an action can be maintained in either case on account of such interference. But, whatever meaning may be attached to the words 'interfered with,' I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business or when he is engaged in any other pursuit."

Quinn v. *Leathem*, Appeal Cases (1901) 495, is one of the most recent decisions of the House of Lords upon the question of trade combinations and conspiracies.

Before discussing it, a curious remark of the Lord Chancellor, Halsbury, merits notice. He states his wish to make two observations of a general character and, having made the first, proceeds:

"The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Substituting the word "court" for law in the last line, a familiar, though possibly somewhat humiliating truth is recorded. In this way the learned Lord Chancellor seems to excuse what looks

like a departure from *Allen* v. *Flood*, where he dissented. On this subject the language of a great English judge may well be quoted.

"The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, acts and circumstances accruing, we must go to the time of Rich. I to find a case, and see what is law. Precedent indeed may serve to fix principles which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law."

Lord Mansfield in *Jones* v. *Randall*, Lofft's Rep. 383–5.

The law of any one jurisdiction ought to be logical and to develop logically and consistently in accordance with settled principles from precedent to precedent. In so far as it fails in this regard, human fallibility and error frustrate the theories of an enlightened and elevated science.

This result may be expected and its causes recognized and deplored; but they should not be judicially canonized as approved and classical agencies for the development of the law.

Quinn v. *Leathem* was a case where a butcher, Leathem, the plaintiff, employed non-union men. He offered to pay all fines, etc., for his men and asked to have them admitted to the union with which defendants were connected. The union refused this, insisted that he discharge his men and finally compelled Munce, a large buyer from plaintiff, to cease to buy of him by threatening to order Munce's men to quit work. He thereupon ceased to do business with plaintiff and the suit was brought and a recovery sustained in the Lords.

Had this been only a case where the defendants among

themselves had agreed not to deal with plaintiff unless he employed union labor, no recovery would have been allowed.

At least such seems to be clearly the ruling from the opinions of the various law lords to which, in spite of the *dictum* of the Lord Chancellor, it would seem some reference should be permitted

It seems also to have been held that the mere fact that parties agree or combine not to buy of others so long as the latter sell to a certain person is not actionable so far as such person is concerned.

It would appear to be the purport of this decision that men are free either singly or in combination to deal with whom they will and upon such terms as they will; but that they are not justified in seeking to dissuade one man from trading with another by threatening to break up the former's business through calling strikes among his men and similar interference and annoyances.

The opinion of the Lord Chancellor seems to call for no discussion. That of Lord Shand was brief. In the course of it he sustains the recovery on the ground that the defendants "acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in trade." *p. 515* v. et 514.

The two principal opinions are those of Lord Brampton and Lord Lindley.

The opinion of the former quotes from Halsbury "All are free to trade upon what terms they will" (p. 525–527), and seems (p. 528) to agree with Lord Shand in the point just referred to.

Lord Lindley discussed the law at great length. Among other things he said:

"A combination not to work is one thing, and is lawful. A

combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful." (p. 538.)

I digress to quote an observation which, rightly considered, is most important in the law of conspiracy, either civil or criminal:

"My lords, it is said that conduct which is not actionable on the part of one person can not be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not." Ib. 538.

On the right to deal or not to deal with others, and in this regard to act singly or in combination, this was said:

"Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner* (1), where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the Mogul Steamship Co. (2) that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen* v. *Flood* (3) emphasizes the same doctrine. The principle was strikingly illustrated in *The Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (4), which was referred to in the course of the argument.

In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs, they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, *no one's right was infringed—no wrong-*

ful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavored to show.

Intentional damage which arises from the mere exercise of the rights of many, is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, *competition with all its drawbacks, not only between individuals, but between associations, and between them and individuals,* is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie,* at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, *numbers* can not be disregarded." 539–540.

This decision is followed in

Read v. *Friendly Society of Operative Stonemasons*, App. cases (1902), S C. 86 L. T. Rep. 593.

The Scottish case cited with approval by Lord Lindley in *Quinn* v. *Leathem* is *Scottish Co-operative, etc., Society* v. *Glasgow Fleshers', etc., Association*, 35 Scottish Law Rep. 645, decided by Kincairney, Lord Ordinary.

It there appeared that an association of butchers at Glasgow told cattle salesmen who sold cattle at auction there, that they would not in future bid at such sales, unless the salesmen declined to receive bids made by the co-operative stores. Thereupon the salesmen inserted a notice in their conditions of sales that they would not accept bids from any one representing co-oper-

ative stores and did in fact, refuse such bids. The sales in question were held on a public wharf, where any one was entitled to transact business or to act as salesman; but it was for the time being the only place in Scotland licensed for the landing of American and Canadian cattle. The co-operative stores sued for injunction against the salesmen and for damages against the butchers.

It was held that the action must fail, because the salesmen might rightfully insert the conditions of sale complained of; and the butchers might properly induce the salesmen to do an act in itself lawful, so long as they adopted only lawful means to that end.

Discussing the case in his opinion the Lord Ordinary said: (p. 645.)

"Any single Glasgow butcher might resolve not to bid at the auctions of salesmen who received the bids of the co-operative societies. He would, of course, be free to bid or not bid as he pleased—nobody could compel him. Clearly also, he might inform the salesmen of his resolution, and he might go the length of asking them to exclude the co-operative store bidders. Such a man would, of course, be laughed at for his pains. But the case would be widely different if a number of butchers took that course ; and here the question of conspiracy comes in assuming that there was a conspiracy. It was indeed suggested by the first defenders that there could not possibly be a conspiracy in this case because the salesmen were not implicated, and the Glasgow Fleshers' Trade Defense Association formed only one *persona*. But I think there is more subtlety in that argument. The Association is formed of a number of individuals competent to conspire ; and I think it would not be a great abuse of words to speak of the Association as in itself a conspiracy. After all the name does not signify. A conspiracy, combination, or association, is, after all, nothing but a kind of contract. But assuming

conspiracy, it is not easy to see what the first defenders did which could subject them in damages. They were entitled to resolve to abstain from bidding at sales at which co-operative bids were received. It was entirely at their option to do that or not. They might also legally allow their resolution to that effect to become public, and probably that would have been all that was necessary. It is true that they went further—probably unnecessarily. They communicated their resolution to the salesmen specially; they called on them to yield to it; and in that manner they procured, and are no doubt responsible for procuring, the action of the second defenders of which the pursuers complain. In the Mogul cases the defendants, being a combination or conspiracy, intimated to certain shippers that they would not do business with them if they did business with the plaintiffs, and even that if they did so they would demand repayment of rebates previously allowed. But that was held to be legal. The distinction between the action of one and that of several has no doubt been taken by various judges in England in different cases, although it does not appear to be clearly established. But I confess I am not able to think that it matters here. It appears to me that the fleshers acted within their legal rights. It may be regrettable that they happened to have so much in their power. That is the accident of their position and of the peculiar character of the foreign cattle market. In *Flood* v. *Allen*, Lord Shand is reported to have said that a 'combination of different persons in pursuit of a legitimate trade occurred in the case of the Mogul Ship Company, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful.'

"That may be so; but I think that this case is strictly analogous to the case of the Mogul, and is not a case of mere malicious purpose—*a case which indeed must occur seldom if at all in business transactions.* I think I am entitled to regard this case as really governed by the case of the Mogul; although I propose to decide it without a proof, because I accept the pursuers' averments and assume nothing against them except that the first defenders, an association of Glasgow fleshers, *did not act wholly*

from malice, but at least in part from a regard to their own interest, protection and defense, which is averred by the defenders and not denied by the pursuers."

It would appear to be exceedingly difficult to distinguish this case from that now before the court if the effect to be given to the statute of Wisconsin be excluded, *pro tempore*, from consideration. It is true the learned court below declares it quite impossible on this record to discover any motive on the part of plaintiffs in error except a purpose to inflict wanton and malicious injury on the victims of their conspiracy with no corresponding benefit to themselves.

It is, perhaps, material here to note that the information charging the intent and purpose of the conspirators to injure, does not aver that this was their only purpose; a similar omission existed in the Scottish case and was relied upon by the Lord Ordinary; and although that case was heard without proof the court felt warranted in drawing the obvious deduction from the plaintiffs' or pursuers' pleadings that the butchers were animated, not only by the purpose alleged, but by a desire to promote their own advantage.

With great deference to the learned court below, the one remarkable circumstance in this case is, that the very learned and able opinion upon the *habeas corpus* proceeding, which is substantially the opinion under examination, should not only fail to admit a similar inference here, but should deny that such a deduction is even conceivable. Men in business are keenly alive to self-interest. It is seldom, in that commercial co-operation now so universal and whose rising tide courts and legislatures are alike impotent to stay, that anything but pros-

pective advantage to those combining their efforts or capital is regarded. The common criticism is that greed of gain, *auri sacra fames*, drives men to disregard those "counsels of perfection" which possibly a broad humanity and a true recognition of the just demands of a benign civilization should suggest. But this desire for self-aggrandizement is almost always, if not invariably, the real motive for such efforts, and it is uniformly and universally recognized as such. The activities of men in finance, in commerce, in professional life, in politics, and even to some extent in religion, are habitually explained upon some theory as to prospective personal advantage or profit thus sought to be secured.

It is sometimes said that this is ignoble; yet, after all, there are worse things. The ethics and methods of the bourse and the forum are certainly an advance upon those of Dick Turpin, or a Corsican vendetta. To assume, for a moment, that the gentlemen now before this court—men of character, intelligence and position, engaged in the business of publishing newspapers in a great community—were actuated by any other or more reprehensible motive than a purpose to promote the pecuniary success of the enterprises in which they were concerned, at the expense, possibly, of a rival publication, is, with all deference to the court below, entirely inadmissible.

Not only is the Scottish case thus favorable to the contention, but accepting *Quinn* v. *Leathem* as attaching some qualification to *Allen* v. *Flood*, or to the opinions expressed in that case, and as an authoritative exposition of the law of England, it clearly condemns the theories of the court below. The language of Lord Lindley and the other law lords is explicit.

The Glasgow case was expressly approved, and the theories contended for were fully sustained.

I cite, indiscriminately, civil and criminal cases; for, bearing in mind that damage, following criminal concert, is necessary before a civil suit will lie, the rules of law are essentially the same, with this exception, in both classes of cases.

It sufficiently appears that the impression of the learned court below that its judgment was inconsistent with modern English law is entirely correct.

It will appear that it is equally unwarranted by the decisions in this country, to which some reference will now be made. There is a case quite in point decided many years ago in Louisiana.

In an action against three insurance companies brought by the master of a steamboat to recover damages for having conspired and agreed with each other maliciously and without cause, except the imposition by plaintiff of reasonable charges for carrying certain freight, not to insure anything on any steamer on which he was employed, it was held on exception to plaintiff's petition that his action would not lie.

The court, per Merrick, C. J., said:

"Undoubtedly, either of the defendants had the right separately to decline taking any risk on any boat on which the plaintiff should be employed as master. Nor could the motives of the company be questioned; whether they were malicious and with the sole design of injuring the plaintiff or not, would be entirely immaterial in a legal point of view, so long as there was no contract on their part and no legal obligation to insure such boat. Courts can enforce only legal obligations and redress injuries to legal rights. 4 Rob. 68; 8 Rob. 84.

Does the fact that the three insurance companies conspired

and agreed with each other that they would not insure on any boat on which the plaintiff should be employed in order to prevent him from obtaining employment, change the character of their acts?

It is difficult to perceive in what respect the combination of three insurance offices out of all the companies of this city should change the character of acts otherwise conceded to be lawful. The companies had the right to say separately, that they would not insure any boat on which the plaintiff should be employed, and we can see no good reason why the three companies, whether they felt themselves aggrieved by plaintiff's charges or not, might not say so in concert."

Orr v. *Home Ins. Co. et al.*, 12 La. Ann. 255.

A similar case, also decided some years ago, arose in Missouri. In *Hunt* v. *Simonds et al.*, 19 Mo. 583–585, the opinion proceeds thus:

"The petition in this case charges the defendants, who are officers of various insurance companies in St. Louis, with having combined, confederated and conspired willfully and maliciously to injure and wholly ruin the plaintiff in his trade and occupation as commander of a steamboat, and having for that purpose and with the intent of effecting the object refused, without cause, to take any insurance upon his boat, whereby he was deprived of all benefit from his occupation, and was compelled to sell his boat and abandon his business. This is the strongest statement of the plaintiff's case, set out in his petition. To this petition there was a demurrer, which was sustained by the court below, and the case is brought here to determine the sufficiency of the petition.

1. Among the numerous cases which have been examined there has been not one found which presents an aspect like the present. All the cases in which damages have been recovered for injuries produced by individuals conspiring against another, are cases in which some positive act was done by the defendants, in pursuance of a common intent. Here the damage to the plaintiff is alleged to have been produced by the refusal of the

defendants to make contracts in the ordinary line of their business. *It is obviously the right of every citizen to deal or to refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him,* except in some cases where by reason of the public character which a party sustains, there rests upon him a *legal obligation* to deal and contract with others."

In the babel of modern authorities it is a great relief to turn to some of these earlier decisions in which the courts boldly and clearly announce general principles of law, as if they intended to stand by them and did not expect to be thereafter compelled to attempt their ingenious evasion in order to decide a later case as it ought to be decided on the merits. Possibly the complex nature of modern affairs imposes difficulties in this regard which an earlier and simpler organization of society did not present. But it sometimes seems as if a court to-day were too anxious, to borrow a favorite phrase in a busy age, to "get results."

It was held in Maine that no action would lie by the owner of a house against one who maliciously refused to employ any tenant of such house and thus prevented the owner from renting it. *Heywood* v. *Tillson*, 75 Me. 225.

There is considerable examination and review of the authorities there to sustain the proposition, quoted from Judge Cooley on Torts, "That the exercise by one man of a legal right can not be a legal wrong to another," and this quite irrespective of the motive of the defendant. The same case is reported in 46 Am. Rep. 373.

An association of master plumbers sent notices to wholesale dealers not to sell to others than members of the association under penalty of a withdrawal of latter's patronage. The whole-

sale dealers thereupon refused to sell to non-members who were in consequence unable to buy from wholesale dealers in that state or elsewhere.

Certain master plumbers, not members of the association, filed a bill in respect of these matters which the court dismissed for want of equity.

Macauley Brothers v. *Tierney*, 19 R. I. 255.

The Mogul Steamship Co. case.

Bohn & Co. v. *Hollis*, 54 Minn. 223.

Cote v. *Murphy*, 159 Penn. St. 420.

Heywood v. *Tillson*, 75 Me. 225, and many other cases were cited, and the court said:

"It is doubtless true, speaking generally, that no one has a right, intentionally, to do an act with intent to injure another in his business. Injury, however, in its legal sense, means *damage* resulting from *a violation of a legal right*. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance.

The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?

We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To

hold such act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and can not be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen and the procurement of violation of contractual relations, are instances."

In a recent case in West Virginia,

Bohn v. *Hollis*, 54 Minn. 223,

Carew v. *Rutherford*, 106 Mass. 1,

Com. v. *Hunt*, 4 Met. 111,

Mogul S. Co. v. *McGregor*, 23 Q. B. Div. 598.

Huttley v. *Simmons*, 1 Q. B. Div. (1898), 181,

were cited with apparent approval.

Transportation Co. v. *Oil Co.*, 50 W. Va. 611.

The defendants were sued virtually in case for conspiracy to injure plaintiff. The court on demurrer to the declaration said, among other things:

"So far this first count charges only the exercise by the defendants of a right of *constitutional liberty*, accorded alike to all, simply the right of self-advancement in legitimate business, self-preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard, we do not yet know; but we do know that thus far the law of the survival of the fittest has been inexorable. Human intellect, human laws can not prevent these disasters. The dead and wounded have no right of action from the working of this imperious law. This is a free country; liberty must exist. It is for all. This is

a land of equality, so far as the law goes, though some men do in the lust of gain get advantage. Who can help it? (p. 621.)

At p. 624 it is said:

"One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another it, is actionable, if loss ensue, nor is it material in the latter case that there was no binding contract between the business man and his customers."

This latter extract touches a point much discussed, the weight to be given to the motive justly ascribable to those charged with conspiracy to injure. It is true that the opinion of the court below proceeds much on this distinction. But it should be particularly noted in this connection as this discussion precedes so much of this brief as deals with constitutional questions that this case declares the right to employ methods virtually those under examination here, to be a "right of *constitutional liberty*" accorded to all.

An interesting and important case is

Bohn Mfg. Co. v. *Hollis et al.*, 54 Minn. 223, etc., 40 Am. St. 319.

An agreement between retail lumber dealers that they would not deal with any wholesaler who sold to retail customers at a point where a member of the association was doing business was held lawful; and injunction was denied to a wholesaler who,

having sold to such a customer, sought to have the association restrained from notifying its members of such sale.

On the "unformulated truth" which Mr. Justice Holmes has supposed may exist under cover of the idea that what is right for one to do may be wrong for many, *Vegelahn* v. *Guntner*, *infra*, the court makes a discreet observation, p. 234:

"It can never be a crime to combine to commit a lawful act but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal."

To which may be added this suggestion, that an act done, though maliciously by one may be lawful, though if many simultaneously and with like motive do the same thing, it becomes unlawful; the result accomplished, *i. e.*, the thing done in the two instances being not at all the same thing.

It is certainly quite lawful to go to church. One man might go maliciously, because he knew his presence there deterred others from attending. But for twice the number that could be accommodated to attend regularly with like purpose is a very different matter. The thing done in one case would be one man going; the thing done in the other perhaps a thousand going. It is the motive of the thing done and its necessary effect that differentiate the two cases. If the thousand men acting with malicious motive should conspire with like evil intent to induce one to go, would he or they be any more criminal than he would if he went *sua sponte*?

This always has seemed to me a distinction overlooked in the discussions of the oft cited case of hissing in a theater. The noise and disturbance created by one man in hissing is one thing; that made by 500 or 1,000 acting together is certainly

not the same thing, and in this sense there is no such thing, as a thousand men acting together doing the same thing that one does. Each of the thousand does the same thing that the others do; but all together, they do a very different thing.

In summing up the Minnesota case the court said:

"With these propositions in mind, which bring the case down to a very small compass, we come to another proposition which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up and stripped of all extraneous matter this is all that defendants have done or threatened to do and we fail to see anything unlawful or actionable in it."

It was held in an Indiana case that a storekeeper has no right of action against a school teacher and members of a school board because they maliciously dissuade pupils by threats or otherwise from trading with him, no dishonest or libelous statements being imputed to defendants.

Guethler v. *Altman*, 26 Ind. App. 587.

A recent case dealing with the principles involved in this discussion is found in Ohio.

N. Y. C. & St. L. R. R. v. *Schaffer*, 65 Ohio. St. 414; S. C. 87 Am. St. Rep. 628.

A discharged employe of the defendant railway sued, claiming that the defendant and other similar companies had entered into a conspiracy that they would furnish one another information as to all employes who had committed or were charged with offenses or had quit work during the railroad strike of 1894 and were members of a certain labor union of railway employes and that no company would employ any person without a release or consent of the company by whom he had been employed called by railroad men a clearance. This having been refused to plaintiff by defendant as he claimed willfully, maliciously and in pursuance of such conspiracy, he sued and recovered a judgment in the court of trial which was reversed by the Supreme Court.

The court said, p 420:

"It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ whomsoever he may wish, and he can not be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person."

The court quotes also with apparent approval from the dissenting opinion of Chief Justice Field in *Vegelahn* v. *Guntner*, 167 Mass. 103; s. c., 57 Am. St. 443.

The dissenting opinion of Mr. Justice Holmes in that case

contains much profound and philosophic suggestion upon this subject. He says:

"The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is not done for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it can not matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted."

But under the Wisconsin statute apparently no debate on this subject is permitted. Two or more persons who combine for the purpose of willfully (*i. e.*, intentionally) *or* maliciously injuring another in his business *by any means whatsoever*, are within its denunciation.

Indeed, on the proposition that an intent to injure in lawful competition is admissible the majority and minority of the court in that case do not seem to differ.

The learned justice also says:

"It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental conditions of life, are to be changed."

And further:

"The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose,

and with the effect, of driving a smaller antagonist from the business."

To these just and thoughtful observations I venture to add the language of an able and accurate judge in a much earlier case.

"Commerce can not require anything which is unreasonable or unjust; but what experience shows that her convenience does require, that she will have, for it will be still adhered to by the common consent of the commercial world; and if the courts should refuse to enforce it with the few who refuse to conform to such a general custom, the moral sense of commercial men will apply its still more coercive influence, which few will withstand." p. 38.

Chief Justice Caton in *Munn et al.* v. *Birch*, 25 Ill. 35–41.

In *Buchanan* v. *Kerr et al.*, 159 Penna. St. 433, the court said, following *Cote* v. *Murphy*, Ib. 420, trespass for conspiracy:

"There was no evidence of a combination to break down Buchanan in his business as a contractor or builder. The evidence showed a lawful combination of workmen engaged in the building trades, to advance wages, by demanding that in the future the employers pay for eight hour's work the same wages that had theretofore been paid for nine hours. The defendants were members of an association of employers which by combination resisted this demand. This combination agreed among themselves they would not sell material to contractors who conceded the advance, would not do work of any kind for them. In pursuance of this agreement they refused to furnish material to plaintiff or to work for him, because, as they believed, he was aiding the striking workmen in their attempt by combination to advance the price of labor."

It was held there could be no recovery and a judgment for plaintiff was reversed.

I now propose to consider briefly some of the controlling decisions in Massachusetts and New York on this general topic.

In the leading case of *Com.* v. *Hunt*, 4 Met. 111, the subject of trade conspiracy was much discussed.

The defendants were members of the Boston Journeymen Bootmaker's Society. It appeared by the indictment that they agreed not to work for any one who should employ any journeymen or other person not a member of their society after notice given him to discharge such workman. It also appeared by the second count that they thus compelled one Isaac B. Wait to discharge one Jeremiah Horne.

The third count charged a conspiracy to impoverish Horne, etc., and acts thereunder.

The fourth, a conspiracy to impoverish him without stating the means.

The fifth, a conspiracy to impoverish employers by preventing them from employing journeymen, not members of the society.

The court, per Shaw, C. J., held the indictment bad and arrested the judgment.

The chief justice says, among other things:

"Stripped, then, of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this: that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman."

In this case the three defendants agreed not to work for any one who should employ the Milwaukee Journal except on certain terms publicly announced. The analogy is perfect, save that in the small number here combining, the element to which

Willes, J., refers in the extract quoted as giving weight and causing danger, is wholly wanting. Yet this great judge held the defendants entitled to their discharge on motion in arrest of judgment after verdict against them.

The chief justice, after declaring the manifest intent of the association to be to induce all engaged in the same occupation to become members of it and that this was not an unlawful object, further said:

"Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were that they should not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we can not perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful but intemperate workman. Still it seems to us, that as

the object would be lawful and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

Right in this connection, but really as a digression, I desire to say a word as to "boycotting." In the city of Chicago there seems to be no restriction by state law or city ordinance as to the location of saloons or places where intoxicating liquors are sold, except in certain limited regions known as prohibition districts. Any person of good moral character paying license and other fees can secure the right to conduct a saloon outside these very few districts anywhere in the city where he can buy or rent premises for that purpose.

There are many short streets in the city running down to the lake occupied solely by residences, there being even no apartment or flat buildings on them. Suppose in such a quiet neighborhood street some one buys a lot and then locates a saloon there. Would it be unlawful for the residents in that neighborhood to conspire to drive him out of it by quietly and peaceably agreeing not to patronize him and to urge all their friends, acquaintances and the public generally not to do so, thus combining to injure this person and to destroy his business? I suggest this merely in view of the observations of the chief justice as a sort of test of the soundness of those principles on which "boycotting," so-called, is condemned. It will not do to say such conduct is lawful when aimed at a man carrying on an unpopular though lawful business and unlawful when directed against some one in another line of business.

For most wrongs the law affords no sort of adequate remedy. Where one such is redressed or prevented by law a thousand are corrected by the spontaneous activities of society. The police

power has, and should have, nothing to do with them. The law can not take cognizance of them. An intelligent, alert and self-dependent people can correct most of the things in the way of trade combinations of which so much complaint is now made without the aid of the law or they can not correct them at all.

In the concrete case put, I submit that it would be impossible to justify a charge of criminal conspiracy. The person at whom it was aimed had exercised his legal rights; this must be permitted to him; and those of his fellows whose interests his enterprise imperiled and whose feelings were outraged by his conduct, although he had done them no legal wrong, must be permitted the like free exercise of their lawful right to injure and destroy this perfectly lawful business so long as in their effort to do so they employ no unlawful means. And so Chief Justice Shaw proceeds:

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another; that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair, or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment." Ib. p. 134.

In this case it will not do to say that the combination or concert alleged was to injure the Journal and therefore it is illegal.

The term "injure" is ambiguous; in its technical sense it imports unlawful injury: and therefore to say a conspiracy to injure is unlawful, is simply to say what no one disputes, that a conspiracy to do an illegal act is unlawful. It is necessary to ascertain, if the observations of Chief Justice Shaw be regarded, first, the purpose of the association; and, second, the means to be employed to effect it.

The purpose of the combination charged here was to induce advertisers not to patronize the Journal. Now whether such a combination is legal or not, inasmuch as such a purpose is not illegal, if sought by lawful measures, depends on the means to be employed. Within the rule laid down by practically all the cases, the means alleged in the information were entirely lawful. Those charged simply advised the advertising public that whoever saw fit to avail themselves of the Journal's facilities should be admitted to the columns of the other papers only on the terms stated. This was simply for the accused to say if an advertiser employed the Journal they would not work for him except on the conditions suggested. This was not boycotting the Journal. It had none of the elements relied on in *Quinn* v. *Leathem*, or the case from Virginia hereafter referred to. It was simply the exercise of a lawful right, which is expressly affirmed in nearly every case where this subject is discussed at any length.

In another leading case in Massachusetts discussing the legality of an association between certain persons keeping sailors' boarding houses by which they bound themselves to use their best efforts to prevent their boarders from shipping in any vessel when any of the crew were shipped from boarding houses not in good standing with the association; and also not to ship seamen

for less than certain specified wages; the Supreme Court of that state said:

"We can see nothing criminal in any of these stipulations; see *Commonwealth* v. *Hunt*, 4 Met. 111; and nothing illegal. If their effect is to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits. New inventions and new methods of transacting business often destroy the business of those who adhere to old methods; sometimes associations break down the business of individuals and sometimes an individual is able to destroy the business of associated men. It would be nothing novel if the plaintiff in the exercise of his ingenuity should in his turn adopt some improvement that shall compel the defendants to dissolve their connection.

Bowen v. *Matheson*, 14 Allen, 499.

In another case in the same court it was held that a conspiracy to obtain from a master mechanic money, which he was under no legal obligation to pay, by inducing his workmen to leave him and by interfering with others to prevent them from entering his employment, or by threatening to do this, so that he was induced to pay the money demanded, under a reasonable apprehension that he could not carry on his business without yielding to the demand was unlawful.

Carew v. *Rutherford*, 106 Mass. 1.

Chief Justice Chapman in that case, while holding as indicated, which is perhaps at least a doubtful ruling on the authorities, said, among other things:

"This principle does not interfere with the freedom of business but protects it. Every man has a right to determine what branch of business he will pursue and to make his own contracts with whom he pleases and on the best terms he can. He may

change from one occupation to another and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men, and it is no crime *for any number of persons*, without unlawful object in view, *to associate themselves together and agree that they will not work for or deal with certain men or classes of men*, or work under a certain price or under certain conditions."

And again, after referring to some early statutes interfering with this liberty of which he had spoken, the learned judge says:

"But experience and increasing intelligence led to the abolition of all such restriction and to the establishment of freedom for all branches of labor and business, and all persons who have been born and educated here and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts not only elevates their condition but secures to skill, industry and economy their appropriate advantages. Freedom is the policy of this country."

If that decision is to be criticised at all it seems as if the learned chief justice had misapprehended the relative importance of freedom from governmental restraint and freedom from possible malicious disturbance and annoyance in carrying on business.

In another case a declaration alleged that plaintiff's copartner and another conspired to compel him to withdraw from the firm and to dispose of his interest in it to them; and to that end, by false and malicious representations and other unlawful inducements offered to various creditors of the firm, procured creditors to attach all the property of the firm and to petition the officer serving the writ to sell forthwith, etc., whereby plaintiff was forced to withdraw from the firm.

Gray, C. J., said:

"The allegations of conspiracy, illegality, falsehood and

malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful (citing cases). No such unlawfulness appears upon the face of this declaration. The purpose of compelling the plaintiff to withdraw from the firm was not in itself unlawful; and the means are not shown to be unlawful, for the plaintiff's creditors, upon the allegations in the declaration, had a lawful right to attach his property and to petition the officers to sell the goods attached. The declaration, therefore, shows no cause of action.

O'Callaghan v. *Cronan*, 121 Mass. 114, cited and followed in *Groustra* v. *Burges*, 141 Mass. 7–9.

Morton, C. J., there said:

"The plaintiff can not maintain this action against the defendant for advising and procuring Hallett to assert and enforce his legal rights, even if the defendant was actuated by malice, because the plaintiff's rights are not invaded, and he sustains no legal injury."

In *Vegelahn* v. *Guntner*, 167 Mass. 92, it was held that an injunction would issue against the maintenance in front of complainant's place of business of a patrol to prevent carrying on his business until he should adopt a certain scale of prices to be paid to his employes.

The extent that this case goes is to hold, in the language of the court:

"But a combination to do injurious acts expressly directed to another by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition and is unlawful."

Two members of that court dissented from the judgment, Justice Holmes at some length; but the difference between the majority and the minority of the court seems to be somewhat on

the facts of the case; for the chief justice seemed to doubt whether there was any actual intimidation and if there were, thought that an injunction was not the proper remedy; while Justice Holmes said that he thought that two men walking together up and down a sidewalk and speaking to those who entered a certain shop did not necessarily amount to a threat of force; and he indicated very clearly the right under the doctrine of free competition of inflicting intentional injury or damage upon the business of a competitor. This case is also reported in 57 Am. St. Rep. 442.

One of the most recent cases in Massachusetts is *Plant* v. *Woods*, 176 Mass. 492. In the opinion of Justice Hammond and the dissent of Chief Justice Holmes all the leading Massachusetts cases and some others were discussed.

This was a bill to enjoin a labor union from conduct tending to prevent the members of plaintiff, another union, from obtaining employment. Defendant sent emissaries to shops where members of plaintiff's union were working and, as the court held, sought to coerce them to abandon that union and join the defendant's association.

The court repudiated *Allen* v. *Flood*, and insisted on the distinction between acts of the same character done from a malicious or from a justifiable motive. The court held (p. 496) that the defendant's threats imported violence, and that they would resort to vile and opprobrious epithets and intimidation.

But all that is here contended for was recognized as true in a general sense (pp. 498–9). *Bowen* v. *Matheson*, *Bohn Mfg. Co.* v. *Hollis* and *Macauley* v. *Tierney* are all cited with apparent approval.

The chief justice agreed with his associates except that he found justification for the defendants in their motive to strengthen the union while the other members of the court held that this possible advantage was too remote to "bring the acts of the defendants under the shelter of the principles of trade competition." p. 502.

It can not be said that any of these cases require condemnation of the conduct of plaintiff in error as illegal or criminal. The most that can be said is that in some of the later cases under the stress of apparent necessity and where a large number were engaged in the combination claimed to be illegal, so as thus to give "weight and cause danger," the court has shown some disposition to depart from the fundamental principles laid down by Chief Justice Shaw and followed in the earlier cases. As already indicated, where a thousand men combine to do each the same thing, the thing concerted is not the same as where one or two or three do or plan to do it. Therefore in a sense the object of the concert may be different, depending on the number combining. Three men or a dozen men agreeing not to deal with another where the effect of loss of their custom is but little may perhaps be said to combine to injure, but not to ruin him at whom their effort is aimed. But if the members of an entire community should for the purpose of ruining a man, thus combine, having the power to accomplish this purpose it is perhaps plausible to say that in scrutinizing such a combination, a court would be justified in taking the number engaged in it and their power to accomplish their purpose, into consideration in determining the nature and object of the conspiracy, as well as of the means contemplated in its execution. Possibly something like this explains

the general tendency of the more recent Massachusetts cases. To me, the views of Mr. Justice Holmes while on that bench naturally appeal strongly; and, eliminating all threats of unlawful interference, tumult, violence and intimidation, open or covert, the necessity of extending the doctrines of criminal conspiracy is not apparent.

I turn now to the decisions in New York; and in view of the fact that the Court of Appeals has recently gone over this subject with great care I shall refer only to that decision and to two others both in courts inferior to that tribunal.

Chief Justice Daly, of the New York Common Pleas, wrote an interesting opinion in a case where a corporation sued one of its members; it was an association of master stevedores, and had adopted a by-law fixing certain prices for work, and providing that if any member should be found guilty of working for any less, he should forfeit the penalty, which might be collected in the name of the corporation; suit was brought for such penalty; there was a demurrer to the complaint; the court overruled the demurrer and sustained a recovery. 2 Daly, 1.

The case contains an interesting review of the authorities, and some sound and philosophical observations upon the general subject of combinations of workingmen. It is doubtful, however, whether the opinion is entirely consistent with the recent case of *National Protective Association* v. *Cumming*, 170 New York, 315.

The Philadelphia Boot & Shoemaker's case is referred to in this opinion, and also the case of the Journeymen Cordwainers of New York, reported in 1 Select Cases of New York, Isaac Riley, publisher, N. Y., 1811. This case is chiefly noteworthy for the learned and suggestive argument submitted by Mr. Sampson for

the defendants which, after the lapse of nearly a hundred years, is still interesting and pertinent. However, Mr. Sampson was formidably opposed by Thomas Addis Emmet, among others, and lost his case. Both were distinguished Irishmen, the latter the brother of Robert Emmet. The case is of no authority, and I do not pause to discuss it.

In considering the stevedores' case involving the validity of combinations of manual laborers, some regard must be paid to the ancient law of England on the subject, both statute and common law, and to the effect which the prevailing notions of an early age, though long since abandoned, have had in shaping the course of adjudication, as is well suggested by Chief Judge Parker in the case cited.

Indeed, notwithstanding the great respect due to the learned utterances of Chief Justice Daly, it is quite doubtful whether he is entirely accurate in his statement that at common law it was not unlawful and criminal for journeymen or laborers to combine to raise their wages. If these questions were at all material in this age of enlightenment, a careful examination of English precedents might be necessary. It is sufficient now to say that in Mr. Chitty's excellent and accurate work on criminal law, Vol. 3, page 1163, is found a precedent for an indictment at common law for a conspiracy among workmen to raise their wages and lessen the time of labor. This indictment does not conclude *contra formam statuti*, but against the peace, etc.; and in a note the author refers to other common law works on practice for similar precedents, among others, against journeymen lamp-lighters for conspiring to raise wages and against journeymen for conspiring to raise wages contrary to the order of justices and adds, "By

concluding the above precedent contrary to the form of the statute it will be good under 2 and 3 Edward 6, page 15, section 1."

It is interesting to note that one of the charges in this indictment is that the defendants did then and there

" unjustly and corruptly conspire, combine, confederate and agree among themselves that none of the said conspirators * * * would work day work or labor any longer than from the hour of six in the morning till the hour of seven in the evening in each day from henceforth, to the great damage and oppression of their masters,etc., and also divers others of his Majesty's subjects."

It is well to contemplate, as we listen to eulogy and panegyric of the common law of England, the spirit of a time which could tolerate either a statute or a rule of law, judicially promulgated, which should make it an indictable offense for any earning their living by hard and exacting manual labor to seek to reduce the hours of daily labor so that they should not be compelled to work from six in the morning until seven in the evening; and possibly when the decisions upon some similar questions promulgated in the present day and generation, come to be studied and calmly reviewed by the future legal historian they may not meet the full approval of a more enlightened and benign jurisprudence. For it is the crowning glory of the common law that it keeps pace with the progress of civilization and the spirit of the age. It is never to be regarded as a system of fixed rules unalterably prescribed and incapable of modification and development. It follows and adapts itself to the customs of the people. It reflects, therefore, the faults of the age. These become in a measure embalmed in judicial decision and thus secure a kind of immortality which tends sometimes to pro-

ject itself into and somewhat fetter another age and time. But this does not warrant though it may in a measure explain the criticism of Beccaria quoted by Sampson that the judicial system of every country is two or three hundred years behind its progress in civilization.

In *People* v. *Wilzig*, 4 N. Y. Co. Rep. 403, there is an extended discussion of "boycotting" in the course of which the court reaches the conclusion that if there is absolutely no intimidation it is not unlawful; but that neither acts of violence nor threats are necessary to constitute intimidation. The attitude of those congregating in front of another's place of business may be one of menace. In the course of his charge to the jury in this case Judge Barrett employed this language:

"You have heard some of the witnesses to-day talk in a very discreet and reasonable way on this subject. They told us that when grievously oppressed by an employer they felt that they had a right to go to their friends and solicit condemnation of the oppressor in some practicable form; well, so they have. They have a right to go to all their friends, make known their wrongs, and say to them, 'If you are a friend of labor, withdraw your patronage from the man who injures us or refuses us justice.' There is no law against that." p. 413.

This is not this case; for those accused here did not say to others withdraw your patronage from our rival; but rather that they would, in dealing with their patrons, give better terms to those who did not deal with their rival than to those who did.

I have cited this case, however, as a part of the history of decision in this country and because the view taken by the court seems to be so just and reasonable. Like many other cases cited in this brief from reports of decisions by courts of original jurisdiction, the case can hardly be regarded as one of authority.

The recent case in the Court of Appeals, just referred to, contains an extended discussion upon the subject of trade conspiracies. It there appeared that a labor union refused to permit its members to work as fellow-servants with members of a rival organization and notified the employer to that effect and that a strike would be ordered unless the members of the rival organization were discharged. Such notice having been given, a member of the rival association was discharged and he and the association brought suit against the officers of the association giving such notice, to enjoin the defendants from preventing the employment of the association or its members, etc. It was held that the bill would not lie.

National Protective Association v. *Cumming*, 170 New York, 315.

In the course of the opinion of the court, Parker, Chief Judge, said:

"Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employe's giving a reason, if he has one, and the fact that the reason given is, that he refuses to work with another, who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work, nor does it give a cause of action to the workman to whom he objects, because the employer sees fit to discharge the man objected to rather than lose the services of the objector.

The same rule applies to a body of men, who having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest, as members of an organization, to refuse longer to work, it is their legal right to stop.

The reason may no more be demanded as a right of the organization than of an individual, but if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer, or to organized society."

And again,

"I know it is said in another opinion in this case that 'workmen can not dictate to their employers how they shall carry on their business, nor whom they shall or shall not employ;' but I dissent absolutely from that proposition and assert that so long as workmen must assume all the risk of injury that may come to them through the carelessness of the co-employes, they have the moral and legal right to say that they will not work with certain men and the employer must accept their dictation or go without their services."

Again,

"It seems to me, illogical and little short of absurd to say that the every-day acts of the business world apparently within the domain of competition may either be lawful or unlawful, according to the motive of the actor. If the motive be good, the act is lawful; if it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good, but according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad."

The court further says (page 328) that if the motive of such conduct be to secure business for the person charged with it, such a purpose is not illegal within the rules laid down in the dissenting opinion in that case, nor under the authorities cited therein, and that it is only where the sole purpose is to do injury to another or the act is prompted by malice, that it is insisted that the act becomes illegal.

The learned judge further said:

"A man has a right under the law to start a store and to sell at such reduced prices that he is able in a short time to drive the storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs and that on this ground the infliction of damages is privileged.

Commonwealth v. *Hunt*, 4 Met. 111–134.

Nor could this store-keeper be prevented from carrying out his scheme, because instead of hiding his purpose, he openly declared to those store-keepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such store-keepers, in the event of their bringing an action to restrain him from accomplishing their ruin by under-selling them, to persuade the trial court to characterize the notification as a 'threat,' for on review, the answer would be: A man may threaten to do that which the law says he may do, provided that within the rules laid down in those cases, his motive is to help himself.

A labor organization is endowed with precisely the same legal right as is the individual, to threaten to do that which it may lawfully do."

The court proceeds to discuss somewhat the course of legislation in England, prefacing it with this suggestion:

"I have refrained from discussing the authorities because it seemed unnecessary for the reason already stated in this opinion, but it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions."

Judge Gray wrote a concurring opinion in which he said:

"Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses and to make any contract upon the subject that he chooses. There is the same freedom to organize in an association with others of his craft to further their common interests as workingmen, with respect to their wages, to their hours of labor or to matters affecting their health or safety.

They are free to secure the furtherance of their common interests in every way which is not within the prohibition of some statute, or which does not involve the commission of illegal acts.

The struggle on the part of individuals to prefer themselves and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

Probably this case is in direct conflict with *Plant* v. *Woods*, recently decided by the Supreme Court of Massachusetts. There was dissent of a number of judges; and yet the doctrine of this case seems so friendly to the fundamental idea of individual and personal liberty, that I hope it may generally be accepted as the law of this country. There is an undertone running through cases maintaining other doctrine that seems to indicate that the courts are influenced by a desire to act on general impressions as to the facts of a particular case, rather than to proceed strictly on the record before them. Some of the language employed in *Plant* v. *Woods* appears to indicate an opinion that all strikes may be enjoined, because such interruptions of labor are usually, as is possibly the fact, attended with violence and intimidation.

Conspiracy is, after all, a kind of constructive crime in many instances, where, by presumptive inference and artificial reasoning, an effort is manifest to reach those whose proved connection

with any illegal conduct is so slight as not to warrant conviction. In labor cases the attitude of union men and strikers no doubt furnishes some justification for this; yet I can but think that harshness and rigor from the bench and strained interpretations of the law to reach desired results aggravate rather than relieve such a situation.

It was, I believe, Macaulay who said that "the true secret of the power of agitators is the obstinacy of rulers;" and Sir Charles Napier, a great soldier, who did not lack in courage and vigor of mind says:

"As to government, all discontent springs from unjust treatments. Idiots talk of agitators; there is but one in existence and that is injustice."

Turning to the decisions of this court there do not seem to be any particularly material on this branch of the case except possibly those arising under the anti-trust act of 1890, to which reference is hereafter made.

There is no common law offense of conspiracy against the United States; and, by statute it is restricted to combinations to do certain indicated illegal acts or to defraud the United States or to violate a law thereof.

U. S. v. *Britton*, 108 U. S. 199.

Pettibone v. *U. S.*, 148 U. S. 197

I do not attempt to discuss all the cases arising at the circuit out of the railroad strikes of 1894; most of them are based on the anti-trust act, in some the rights of receivers were in question and in none were questions involved in this record fairly before the courts. I must, however, particularly refer to *Arthur* v. *Oakes*, 63 Fed. 310–329.

In that case an able and discriminating circuit judge, doubtless much impressed by the evils threatened to a great railroad property in the custody of his court, had ruled, as quoted by the Supreme Court of Wisconsin, that the employes of his receivers could not exercise their lawful right to quit work in combination because their conduct was tainted with an unlawful purpose, to-wit, the purpose of crippling the operation of the road. Mr. Justice Harlan, sitting in the Court of Appeals, corrected this error, and in the case cited said:

"These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the *firm belief and expectation* that a simultaneous quitting without notice *would temporarily inconvenience the receivers and the public.* If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they can not be legally charged *with any loss* to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to employes exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among the employes, and their withdrawal from service. * * *

What we have said about illegal combinations has no reference to such associations, but only to combinations *formed with*

the intent to employ force, intimidation, threats or other wrongful methods, whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

Arthur v. *Oakes*, 63 Fed. Rep. 310–329.

In other words, the conduct of the strikers, if lawful, might involve and be intended to involve loss; but this is not injury; it is, on the other hand, *damnum absque injuria*. This case seems to be quite inconsistent with the views of the court below; a proposition which is fortified by the fact already referred to, that the learned justice writing the opinion quotes the language of the Circuit Court on the very point just stated, and on which the Court of Appeals differed with the court of first resort.

Another important case in this connection, not because it decided the question here involved as in that case there was no statute in question, but because it reviewed at some length and with much discrimination many of the cases decided on this general branch of the law, some of which are cited in this brief, is *Continental Insurance Co.* v. *Board of Underwriters*, 67 Fed. 310, decided by Mr. Justice McKenna, then circuit judge.

It appeared that certain underwriters formed an association under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents and non-intercourse with companies not members. It was held that this was not an illegal conspiracy and that the accomplishment of its purpose by lawful means would not be enjoined at the instance of an insurance company not a member; and it was also held that the dismissal of an agent by one of the association com-

panies for refusal to represent such company exclusively and refusal to place insurance for outside companies, were lawful means to accomplish the purpose of the association.

In the course of the opinion it was said:

"It was admitted at the oral argument that some of the acts of the defendant company were lawful of themselves. For instance, it was admitted that it was competent and lawful for a board company to choose to be served or not to be served by an agent who was also agent of the plaintiff; that it was competent and lawful for it to accept or refuse re-insurance from the plaintiff or its customers, or anybody, or join or not join in insurance with either.

These it was conceded were business privileges which might have various and justifiable methods, but it was contended that the combination being unlawful, these acts lost their privileges and became unlawful too. This makes the first, if not the principal, inquiry the character of the combination. Was it unlawful?

To put it more narrowly and hence more precisely, for our purpose, was it so far illegal that the plaintiff may complain of it and enjoin it or its acts without regard to the quality of the latter?"

This the court decided in the negative.

It is true this was a civil case, like the case of the Mogul Steamship Company, much relied upon in that case; and the question was not, therefore, whether the combination was so far criminal as to be the subject of indictment, but was the question stated in the language just quoted; and certainly much less was there involved in that case, any question as to the constitutionality of a statute aimed at such combination.

Both of these cases are highly favorable to the contention urged for plaintiff in error, and go far to demonstrate that he is not guilty of any unlawful conspiracy unless by statute.

Another federal case was decided by the Court of Appeals for the Sixth Circuit. In it Judge Thayer said:

"It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice, or ill-will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated—that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view *which the law will consider* was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful."

Possaic Print Works v. *Ely & Walker Co.*, 105 Fed. 163, 166-7.

A few other recent cases may be noted which possibly may seem to be inconsistent to some extent with the cases already

cited, such as the recent decision of the New York Court of Appeals.

Jackson v. *Stanfield*, 137 Ind. 592–621, expressly disapproves *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, and rules the contrary on similar facts.

The opinion is long and makes rather an indiscriminate citation and use of cases. It does not seem to require extended comment.

In a recent case in Michigan "boycotting is held illegal and there is some discussion of labor combinations and "picketing."

Beck v. *Ry. Union, etc.*, 118 Mich. 497;

S. C., 74 Am. St. 421.

In a Vermont case it is decided that if two or more persons combine to drive, by violence or intimidation, an employer from retaining or employing certain persons, or an employe from entering his service, this is a criminal conspiracy at common law.

State v. *Stewart*, 59 Vt. 273;

S. C., 59 Am. Rep. 710.

With this proposition there can be no quarrel, although the court in its opinion says a great deal that would seem to be entirely inconsistent with any just notions of the degree of individual liberty secured by constitutional provisions.

It appears that in this case the indictment charged the defendants with an intent to prevent the prosecution of the work of the Ryegate Granite Works by threatening certain of their workmen; by declaring the works "scab" shops, their workmen "scabs," that their names would be published in the "scab's" list in the Granite Cutter's Journal, and that they

would be shunned and not allowed to work with other granite cutters, and would be disgraced in the craft, etc., by all which O'Rourke, Goodfellow and others were frightened and driven away from the shops.

It would seem as if this was clearly an unlawful conspiracy within the definitions of Chief Justice Shaw in *Com.* v. *Hunt.*

A different question would be presented in this case if the plaintiff in error were charged with a purpose to prevent the publication of the Journal by similar means. The decision is no authority in favor of the judgment below.

In a case in Virginia it was ruled that where two or more persons conspire by their intimidation or molestation to deter or influence another in the matter of whom he should employ, his industry, his capital, etc., they are guilty of an offense. *Crump* v. *Commonwealth*, 84 Va. 927; S. C. 10 Am. St. Rep. 895.

If the terms intimidation or molestation were rightly understood, it would not be possible to criticise this decision; but it appears that the court sustained the indictment and conviction in that case upon the ground that it charged a conspiracy to break up and destroy the business of a certain firm, without stating or alleging the employment of any unlawful means to this end.

This decision is plainly inconsistent with *Bowen* v. *Matheson*, and many other cases and is obviously unsound in principle.

It is based on the early English cases, which, as has been well pointed out by Chief Judge Parker in the recent New York case cited, "are not a safe guide in this domain of the law." It is to be discriminated from the case before the court in two im-

portant particulars. It was a boycott on an extensive scale carried on by the members of a typographical union in connection with the Knights of Labor, with which that union was affiliated. Its object was apparently to absolutely destroy the trade of the firm in question, not only throughout the State of Virginia, but elsewhere. There seems to be a kind of suggestion running through the opinion that this was to be done by means of a species of intimidation; but whether so or not, the conspiracy alleged was of a wholly different nature and of a vastly greater magnitude than the combination asserted in the information in this case; and again, the object charged in the indictment was a conspiracy to injure, ruin, break up and destroy the business of the firm in question, not by competition at all, but by a species of coercion and intimidation; whereas, as is perfectly apparent from the information in this case, the object of the combination here was merely to injure the Journal Company in its trade and business and the means to be employed were such as are actually employed in all competitive commercial effort. The principle quoted and contained in the syllabus is unnecessary to the decision in that case, for there is a practical distinction to be taken between a combination of two or a small number in the way of trade and competition thus to injure another and a combination which by its very magnitude tends to riot, disorder and breach of the peace and is almost inevitably accompanied by intimidation, either open or covert, and a kind of terrorization of those who would otherwise trade and do business with the persons conspired against.

In this case it was proved in the language of the court that "minions of the boycott committee dogged the firm in all their

transactions, followed their delivery wagons, secured the names of their patrons, and used every means short of actual physical force, to compel all persons to cease dealing with the firm."

If it be true, however, that in this case there was no intimidation or unlawful conduct or riotous congregation of the conspirators and their confederates; in other words, if there was only such a combination to take away trade from the complainant firm, as the court declared to be admissible in *People* v. *Wilzig*, decided by Judge Barrett in New York, then it would appear that this case is not sustained by sound principle.

A case which proceeds somewhat upon the general theories laid down in the Virginia case, and to which the same comment is applicable, although it was a civil and not a criminal proceeding, is found in Maryland. *Lucke* v. *Clothing Cutters, etc., Assembly*, 77 Md. 396; s. c., 39 Am. St. 421.

This was an effort by the union to procure the discharge of a non-union man in the employ of a firm in Baltimore, with the threat that all labor organizations in the city would otherwise be notified that the house was a non-union house. The union in that case, however, was incorporated under the laws of Maryland.

There is a case decided by the Circuit Court of the United States for the Southern District of Ohio which holds that a combination by a trades union to boycott a newspaper for refusing to unionize its office is illegal, unlawful and should be enjoined by a court of equity.

However, that case enjoins a boycott on the theory that this is, in popular apprehension, an organized effort to exclude a person from business relations with others by persuasion, intimida-

tion and other acts which tend to violence and thereby coerce him, by fear of personal injury, to submit to dictation in the management of his affairs. There runs through the entire opinion in that case the idea that the combination sought to be enjoined, came under this category. It is on its facts a case quite different from that before the court.

In a Texas case, a suit for damages, where plaintiff, a dealer, charged that defendants refused to sell him goods maliciously, and induced a third person to do so, it was held on demurrer that the petition was good.

Delz v. *Winfree et al.*, 80 Tex. 400.

The court said, p. 404:

"The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to his property.'

The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may, from such motives, influence another person to do the same thing. If without such motive the cause of one person's interference with the property or privileges of another is *to serve some legitimate right or interest of his own*, he may do acts himself or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated."

Citing and quoting at length from *Walker* v. *Cronin*, 107 Mass. 562.

This case, in so far as it regards motive as important, and indeed controlling, may be said to sustain the judgment below.

But with deference it is thought that the court below fell into error in imputing merely wanton and malicious motive to plaintiff in error.

A case which will no doubt be cited if noticed by counsel for the state is *Brown* v. *Jacobs Pharmacy Co.*, 41 So. Eastern Rep. 553 (Ga.).

The fact most apparent to the casual reader of this opinion is the frequent reference to the work of Mr. Arthur J. Eddy of the Chicago Bar on Combinations, Trusts, etc.

The writer ingenuously remarks, referring to a Massachusetts case on which I rely, that it has been "criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations." Inasmuch as this brilliant and versatile gentleman has organized and promoted several of the largest combinations in the country, his attitude may be regarded as not necessarily hostile.

But to say that *Bowen* v. *Matheson* is "not a well-considered case," on the authority of copious collocation from Mr. Eddy's work and statement of his opinion is not convincing.

The facts in that case are wholly dissimilar to those in this record; and while the court differs from some cases already cited and relied on as an authority it does not sustain the judgment below.

An extreme case is found in New Jersey.

Frank v. *Herold*, 52 Apl. 152.

Vice-Chancellor's Court. It does not seem worth while to examine minutely what seems to be the anomalous rule in that state; nor even to speculate how far the fact that this state is the

notorious breeding ground for predatory and fraudulent corporations and monopolies may color or affect its jurisprudence in the matter of labor difficulties. The case before the court is, however, entirely different from that case in its facts.

The law of criminal conspiracy, in relation to trade combinations, is summarized and the cases cited to some extent by Mr. Eddy in his work upon Combinations, Vol. 1, Sec. 341, *et seq.*; and if the court desires to trace the early history of the law in England upon this subject, it may be found examined with much apparent learning and original research in an article by Mr. Frank P Blair of Chicago, on "Judge-made Law of Conspiracy," 37 American Law Review, 33.

The work of Mr. Wright is familiar and instructive.

The argument of Mr. Sampson in the Cordwainers case is referred to elsewhere.

A total departure from sound principle absolutely destructive of that certainty which ought, upon every consideration of justice and expediency, to mark the criminal law, was made when it was held that a conspiracy to do that not criminal, but which is injurious or prejudicial to society or immoral, is indictable.

Such a principle once admitted of course the law on this topic is uncertain, as indeed it is on many others. But it is uncertain in a field wherein above all others certainty is essential. With what justice or propriety can society punish crimes which are never defined by the law until after their commission?

In a leading case on this subject this language is employed by Chief Justice Caton. (*Smith* v. *People*, 25 Ill. 9–13.)

"To attempt to define the limit or extent of the law of conspiracy, as deducible from the English decisions, would be

a difficult if not an impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. In the former case it is not necessary to set out the means used, while in the latter it is, as they must be shown to be unlawful. But the *great uncertainty*, if we may be allowed the expression, is as to what constitutes an unlawful end, to conspire to accomplish which, is indictable without regard to the means to be used in its accomplishment."

How absurd to punish when courts of the highest authority confess their inability to declare in advance any boundary whatever to this field of criminal law. Anything that to a court seems *contra bonos*, though not subject to criminal prosecution if actually done or committed by one, becomes, when agreed upon or concerted, though no step be taken toward its consummation, the subject of penal visitation.

The reasoning on which this principle is justified is entirely fallacious. The case just cited was one of conspiracy to seduce. The court said:

"If the laws of the land will not afford such protection then individuals will protect themselves by violence, for it is not in human nature to let such offenses go unpunished in some way."

The courts are in nowise responsible for the provisions of the penal code. Is the offense of conspiring to seduce a young and innocent female appreciably more heinous or atrocious than the offense of actual seduction? Is the unattempted plot more likely to invite violence than the accomplished wrong?

Yet the legislature has seen fit in the state where this case was decided, not to make seduction a crime. In many cases there is nothing that rouses a righteous indignation like this be-

trayal of innocence and virtue; and in extreme cases, in the forum of a public opinion by no means unenlightened, when the natural protector of the unfortunate victim exacts the life of her betrayer; he is not condemned—yet the offense he has thus avenged is, and when the court spoke was, no crime. If it ought to be, let the legislature and not the courts take the responsibility.

The principle on which these and identical rulings rest is most hostile to liberty. In these cases, that the object of the conspiracy is not only immoral but injurious to the social order, admits of no debate. Many classes of cases have arisen, however, where the object of the combination under investigation is so remotely related to private morality or the public welfare, that to pronounce it so far injurious as to be criminal, is simply to express a doubtful opinion on some economic or social question. To carry this principle to its logical conclusion would strongly tend to deprive men of all personal liberty. The evils which follow and attend upon the sale of intoxicating liquors can hardly be overstated. Shall brewers, owners and distillers interested in the manufacture and sale of their liquors be therefore amenable to a charge of criminal conspiracy, because they meet together to concert plans for attractive advertisement of their wares and other novel allurements, by which the sale of their product shall be increased? True, such sale may be permitted by law; but this furnishes no protection. If it is injurious to the public welfare there is ample authority, on principle, for their condign punishment. During the next year it will, no doubt, be clearly indicated by many capable and thoughtful men that the political party to which they are

opposed is seeking to compass the ruin of our country. If some judge be satisfied that the doctrines of his political opponents are thus destructive and pernicious, can he therefore convict and sentence those advocating them on a charge of criminal conspiracy to do that which is clearly against the public welfare?

Upon like principle the professors of an obnoxious religion, those who practice some unpopular method of healing, possibly the manufacturers of some, if not most, of the numerous breakfast and health foods which now excite the public expectation and impair individual digestion, may all be brought within the denunciation of this sweeping and compendious interdict against combining to do that which is injurious to society and hostile to the general welfare. That is precisely what is happening to-day in respect of the combinations of workmen; for it is those, unfortunately, with the least powers of resistance, upon whom the strong arm of the law descends most heavily.

What, then, is the argument? That this court should overturn the settled law of criminal conspiracy? By no means. Indeed, literally to do this is an impossibility; if for no other reason, because there is no "settled law" on the subject. It is not even proposed, in the language of the court below, to revise all our notions of the law of conspiracy and rewrite the books on this topic.

Let the law, so far as it is settled, stand; but let it remain settled, and not with ever-increasing sweep take in all the essential rights of personal liberty, freedom of thought, speech and action, singly or in combination, which have been supposed to be guaranteed by the constitution and frame of our government.

To conspire to seduce is criminal: so say the cases, and let it be so. But let us proceed no farther in a wrong direction. As to conspiracies generally to do that which is lawful, let them not be held to be criminal, unless, as in the instance referred to, this is settled law. If further progress in that direction is necessary let it be made by legislation and not by judicial construction.

Let the doctrines of Chief Justice Shaw, based on Lord Denman's definition of conspiracy, in all new cases be followed strictly; and then something will be done to rescue the law on this subject from that confusion worse confounded in which it is now almost hopelessly beclouded.

It is a fact to be noted that from the judgment of the Supreme Court of Illinois in the case just discussed that great judge, profound lawyer and steadfast friend of liberty, Sidney Breese, dissented.

I summarize this part of the argument as follows: The combination alleged against plaintiff in error and his associates was not criminal at common law, quite irrespective of the motive which animated it. But that motive was obviously self-interest. That it was not solely inspired by mere wanton malice the court below concedes. What that learned court intends by averring that there was some proof that the accused made the agreement to maliciously injure the Journal company in its business must be left to conjecture. For on the *habeas corpus* the sufficiency of the complaint was before the court. There was no evidence in that record.

In determining whether the parties charged were in the exercise of lawful rights to liberty, guaranteed by the Federal Constitution, there being questions of law only and none of fact

in this case, this court is not bound by the conclusion reached by the court below in this regard, but will examine the question independently; and, if of opinion that the motive is material and that the inference of self-interest, as a motive, is legitimate, then this court is entirely at liberty to draw such inference, quite irrespective of the conclusions of the Wisconsin court.

I shall now proceed to examine the nature of the right to liberty guaranteed by the Fourteenth Amendment, and shall endeavor to show that the right to do that with which the parties here accused stand charged is secured beyond State interference.

But I repeat again, if it be the subject of prohibition by the State, the further question remains, not what is the power of the State in this regard, but is the statute in question an admissible exercise of that power; and that question must be determined wholly irrespective of the facts in the information, on an inspection of the statute as construed by the court of last resort in the State where it was adopted.

II.

I premise this discussion with the statement of an important principle of constitutional law from a recent decision of this court:

"The question of constitutional law to which we have referred can not be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when

avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

Connolly v. *Union Sewer Pipe Co.*, 22 Sup. Ct. Rep. 431–438.

Numerous authorities can be cited on this subject. I have aimed to gather only the most recent and authoritative. As they cite and refer to the earlier decisions the court will be thus readily possessed of most, if not all, the cases on the subject.

In *State* v. *Goodwill*, 33 West Va. 179, it was held that a statute declaring that all persons engaged in mining coal or other minerals, or mining or manufacturing them, or manufacturing iron or steel, or any other kind of manufacturing, should not issue for the payment of labor, any order unless redeemable at its face value in lawful money of the United States, with legal interest payable to the employe and redeemable within thirty days, was unconstitutional and void. The court stated the question involved thus:

"Can the legislature, in view of those constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal or other disability, when the subject of the contract is lawful and the exercise of it is purely private and personal to the parties themselves?"

This question was decided in the negative.

The court considered somewhat the nature and extent of the police power, commenting upon the great case of *Munn* v. *Illinois*, decided in this court, 94 U. S. 113, and declaring that the reason for that decision was that the business carried on by

the persons there complaining of legislation was of a public nature. To this case, as reported in 25 Am. St. 863, is appended an extended note, citing many decisions on this question.

A statute of Pennsylvania, attempting to prohibit payment of employes in anything but cash, even by mutual consent, was held unconstitutional. (*Godcharles* v. *Wigeman*, 113 Penn. St. 431.)

The court said, page 437:

"The orders given by the defendants and received by the plaintiff, constituted a proper set-off. The first, second, third and fourth sections of the act of June 29th, 1881, are utterly unconstitutional, and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, can not be done; that is, prevent persons who are *sui juris* from making their own contracts."

It is true it has been decided in the same state that the business of insurance against loss by fire is of such magnitude and importance, and of such a nature, that it may be properly regulated under the exercise of the police power of the state, and such a regulation, by reason of this, will be sustained by the courts.

Commonwealth v. *Vrooman*, 164 Pa. St. 306; S. C., 44 Am. St. 603.

That, however, does not affect this case.

A statute forbidding an employer to impose a fine upon, or withhold wages from, an employe engaged in weaving, for any imperfection in the weaving, was held unconstitutional in Massachusetts though the Fourteenth Amendment to the Federal Constitution does not seem to have been considered.

Commonwealth v. *Perry*, 155 Mass. 117; S. C., 14 L. R. A. 325; Holmes, J., Dis.

In New York a statute prohibiting any person selling any article of food from offering to give or giving some other article as a gift or prize in connection with such sale, is held to be unconstitutional, as depriving a person of life, liberty or property without due process of law. *People* v. *Gillson*, 109 N. Y. 389; S. C., 4 Am. St. 465.

In the course of his opinion in that case, Judge Peckham stated these canons of constitutional law:

"A person living under our constitution has the right to adopt and follow such lawful industry or pursuit not injurious to the community as he may see fit. The term "Liberty" as used in the constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his creator, subject only to such restraint as is necessary for the common welfare.

Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation * * *

It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late; a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislators to secure some enactment which will operate favorably to them, or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

Discussing then the question as to whether the act under ex-

amination was valid as a proper exercise of the power of the police, the court remarked that this power was not above the constitution, but limited by its provisions and that the legislature could not without reason and arbitrarily infringe upon the liberty or property rights of any person within the protection of the constitution, and that its exercise of power in this regard was subject to the scrutiny of the courts; and that upon such examination, courts must be able to see that there was some fair, just and reasonable connection between the legislation in question and the public health, comfort or safety. The court also recognized the power of the legislature to declare what conduct should be criminal but remarked that there was a limit even to that power under the constitution.

A very full and exhaustive discussion of a constitutional question somewhat similar to that presented in this record is found in the case of *Leep* v. *Railway Company*, 58 Ark. 407, reported also in 41 American State Reports, 109.

In that case the constitutionality of an act of the State of Arkansas requiring railroads and some other corporations and persons to pay their employes on the day of their discharge, unpaid wages then earned, at the contract rate, without abatement or reduction, failing which, such wages should continue as a penalty at the same rate until paid, was under discussion. The court held this act to be void as to natural persons, but valid as to corporations under the reserved power to alter, revoke or annul their charters. After considering some instances in which legislation affecting the right to contract was deemed admissible, the learned court proceeded as follows:

"We have thus far spoken of the limitations that can be

imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition and not on the absolute right to control. We think that it is obvious that the right to contract can not be limited by arbitrary legislation which rests on no reason upon which it can be defended; for if it could, the right would cease to exist and become a license revocable at the will of the legislature, and the government would become a despotism in theory if not in fact. Such a power can not exist, for if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property and to pursue happiness, declared to be inalienable by the constitution of this state. When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to persons or society or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof."

An ordinance of a city in the State of Arkansas prohibited drumming or soliciting patronage for hotels, boarding houses, bath houses, physicians, quacks and venders of nostrums. It was held void as to physicians and hotels, boarding houses and bath houses.

Thomas v. *City of Hot Springs*, 34 Ark. 553.

The court said:

"No doubt a corporation may make it a penal offense for any person to drum customers to gaming houses, gambling tables, banks, etc., * * * and other occupations which are immoral and pernicious in their character and tendencies, such as it has power under its charter to suppress. But the keeping of hotels, boarding houses, bath houses and the practice of medicine by competent persons, are ordinary, lawful and useful occupations, and to make it a crime to solicit custom for them, is an unwarranted interference with constitutional rights and privileges of citizens under our form of government. In this case appellant was charged and convicted for soliciting a patient

to a physician, who was a graduate of medicine, and skilled, it is admitted, in his profession. It may be in bad taste, and a violation of the ethics of his profession, for a physician to employ a drummer to procure patients for him, but appellee had no legal power to make such drumming a crime, and punish it as such."

The phrase showing that the court regarded this ordinance as an unwarranted interference with constitutional rights has been quoted because the decision seems to be also based upon the proposition that the city lacked authority under the statute to pass such an ordinance. However, the reason for this holding seems to be in substance that the ordinance was illegal upon the grounds indicated in the quotation. This case is also reported in 36 Am. Rep. 24.

An important decision upon constitutional law is *State* v. *Scougal*, 3 S. Dakota 55, also reported 44 Am. St. 756.

This case held that the incidental powers of banking, as discounting and negotiating notes, bills, drafts, etc., receiving deposits, buying and selling exchange, coin and bullion and loaning money, required no legislative sanction for their exercise and that an individual could not be deprived of the right to exercise those powers by state legislation. In this opinion there is an interesting discussion as to the extent of the police power; page 67 the court observes:

"According to the maxim *sic utere tuo ut alienum non laedas*, it must be within the range of legislative action to define the mode and manner in which one may so use his own as not to injure others, subject to the provisions of the Constitution, State and National, and to those great fundamental principles enunciated in the Declaration of Independence; but under this power it is not competent for the State to prohibit the citizen from carrying on any trade, occupation or business that is not offensive to

the community or injurious to society; the business may be regulated but not prohibited."

At page 69 the court concludes this discussion with this language:

"If the police power of the State is as broad and comprehensive as claimed by the learned attorney general, the citizen holds his right to liberty, to his property and to the pursuit of happiness at the will of the legislative power alone. But the rights of the citizen are not thus left to the will of the law-making power; the State constitution and the National constitution have placed around the rights of the citizen safe-guards that protect them from invasion by legislative action."

After quoting the provision of the State constitution and a paragraph from the Fourteenth Amendment to the Constitution of the United States, the court remarks:

"These constitutional provisions are not mere glittering generalities, but constitute sacred guaranties to the citizen that his liberty and his right to the pursuit of happiness shall not be abridged, and his right to his property shall not be invaded by the legislative power except so far as authorized by the sovereign power as expressed in the constitutional provisions, or by due process of law."

And again, p. 72:

"In these constitutional provisions are found the guaranties to the citizen of his right to liberty, his right to the pursuit of happiness, his right to pursue in his own way any lawful business or calling and his right to property as well as from those great fundamental principles which underlie our system of government."

In general it may be said that a state can not, under the guise of the exercise of the police power, overthrow or impair the constitutional rights guaranteed to its citizens. It is not within the power of the Legislature, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community, or

that will be oppressive or burdensome on the citizens, and the question whether or not the Legislature has passed the just limit of its powers in this regard is always a judicial question.

Slaughterhouse Cases, etc., 16 Wall. 36.

Toledo, etc., Railway v. *The City of Jacksonville*, 67 Ill. 37.

Liquor Cases, 25 Kan. 751.

37 American Report, 284.

State v. *Fisher*, 52 Mo. 174.

In re Jacobs, N. Y. 98; 50 Am. Rep. 636.

People v. *Marx*, 99 N. Y. 377; 52 Am. Rep. 34."

An act requiring railroad, express and telegraph companies to give in writing to a discharged employe the reasons for his discharge and if induced by any complaint or communication made to the company to inform him of the nature, substance and date of such communication, was held unconstitutional in Georgia as "violative of the general private right of silence."

Wallace v. *Ga. C. & N. Ry Co.*, 94 Ga. 732. No opinion.

A statute of Missouri prohibited employers from entering into any agreement with an employe requiring him to withdraw from or refrain from joining any trade or labor union.

This act was held unconstitutional by the Supreme Court of that state.

State v. *Julow*, 129 Mo. 163; S. C., 50 Am. St. Rep. 443.

The court said:

"Now, as before stated, each of the rights heretofore mentioned carries with it as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right. Take, for instance, that of property; neces sarily blended with that right are those of acquiring property

by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly for any unwarranted termination."

And again:

"If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract, as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such an act guaranteed by the organic law, the exercise of a right of which the Legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the Legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act, and, consequently, we hold that the statute which professes to exert such power is nothing more nor less than a "legislative judgment," and an attempt to deprive all who are included within its terms of a constitutional right, without due process of law."

To these propositions many cases are cited. Counsel for the state cite a similar statute in Indiana as indicating that the statute here in question is valid.

The constitutionality of an ordinance adopted by a city in California, which provided that any person who kept or maintained a room or other place where opium or any of its preparations were sold or given away, and every person, who resorted to or frequented such room or place should be guilty of a misdemeanor, providing that it should not apply to the sale or gift of any preparation of opium by any druggist for any purpose not caused by the use of opium or any of its preparations arose in a case at the Circuit. This ordinance was held to be in conflict with the Fourteenth Amendment and void. *In re Ah Jow*, 29 Fed. Rep. 181.

This was so declared, inasmuch as this ordinance made it a crime for any person, whether knowing the character of such a place or not, to enter it, or knowing it, to enter it for any lawful purpose. Judge Sawyer said:

"It is to prohibit an act which is innocent in itself and lawful under the general laws of the land and, therefore, inconsistent with the laws of the land. It is to put an unlawful inhibition upon the inalienable rights and liberties of the citizen; and to commit him to prison for doing so, is to restrain him of his liberty without due process of law, in violation of the Fourteenth Amendment to the National Constitution. See *Yick Wo* v. *Hopkins*, 118 U. S. 356."

In the case referred to by Judge Sawyer, Mr. Justice Matthews used this language:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agency of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must be always lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under

the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This is indeed a noble and philosophical statement of the great essential principle of constitutional liberty.

The actual question involved seems perhaps of small moment: whether a humble Chinaman might carry on a laundry in a frame building in San Francisco.

But every case in which constitutional right is asserted is important, involving, under the Fourteenth Amendment, as was said in that case, "the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

It was held by the Circuit Court for the Northern District of Texas that a statute of that State which makes it criminal for two or more persons to combine as partners, corporators or otherwise in the ordinary business of life, to increase or reduce the price of commodities or fix the standard thereof, or for two or more persons to agree to limit or reduce the production of commodities, or for two or more persons to combine for the purpose of limiting competition, or to make an agreement in relation to the price of an article so as to preclude an unrestricted competition between them, or themselves and others, or for two, or more persons to create and carry out restrictions in trade, violates the Four teenth Amendment of the Federal Constitution

It is true that this court reversed the judgment of that court, the proceeding being *habeas corpus*, but without discussing the questions involved in that case. This case contains an extended discussion as to the nature of the rights to life, liberty and property secured by the Fourteenth Amendment; and the learned judge calls attention to a distinction which is not unimportant, where he remarks that no attempt is made by the act there in question to condemn only acts which are oppressive by reason of their magnitude.

In re Grice, 79 Federal, 627. It is true the court in that case seems to have been somewhat influenced by the decisions in the lower courts of the case of *United States* v. *Trans-Missouri Freight Association*, reversed in this court; but that case was a case where the validity of congressional legislation was in question, which was held to prohibit combinations and agreements in restraint of trade entered into by those engaged in a business impressed with a public use or trust.

A statute of Ohio provided that no railroad company, insurance company or association of other persons, should require any agreement or stipulation with any other person in or about to enter into the employment of a railroad company, whereby such person agreed to waive any right to damages from such railroad company for personal injuries, or any other right whatever, and that all such agreements and stipulations should be void. It was held by Judge Ricks, in the Circuit Court of the United States for the Northern District of Ohio, that such a statute was contrary to the Fourteenth Amendment. *Shaver* v. *Penn. Co.*, 71 Fed. Rep. 931.

The Supreme Court of Illinois in a long line of cases has elaborately vindicated the essential right to liberty secured by the constitution of that state and by the Fourteenth Amendment of the Federal Constitution.

One of the more recent of these decisions, which cites many that have gone before, is the case of *Braceville Coal Company* v. *People*, 147 Ill. 66.

A statute of Illinois provided that every manufacturing, mining, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation and every incorporated Express Company and Water Company should pay its employes weekly. This statute was held to be unconstitutional.

This case, with the cases from Illinois hereafter cited, establish the proposition that liberty as used in the constitution means not mere freedom of the citizen from servitude and restraint, but the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.

In *Gillespie* v. *People*, 188 Ill. 176, an act, similar to the Indiana statute cited by counsel, making it a criminal offense for an employer to attempt to prevent his employes from joining labor unions or to discharge them on account of membership therein, was held to be unconstitutional. The court, referring to constitutional inhibitions against taking away life, liberty or property and the rights thus guaranteed, said, p. 183:

"These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary

arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away except by due process of law. (2d Story on Const., 5th Ed., Sec. 1950.)

The rights of 'life,' 'liberty' and 'property' embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract. (*Ritchie* v. *People*, 155 Ill. 98.)

If an owner can not be deprived of his property without due process of law, he can not be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property.

The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts."

The case of *Ritchie* v. *People*, 155 Ill. 98, contains an extensive review of the authorities upon the question how far the Legislature, in the exercise of its police power, may trench upon the constitutional rights to life, liberty and property.

In that case a statute providing that women should not be employed more than eight hours a day in any factory or workshop, nor more than forty-eight hours in any one week, was declared to be unconstitutional. It may well be doubted whether this case was rightly decided; but the opinion is worthy of careful consideration in its review of previous decisions of that and other courts. It would not seem to be a violent presumption in favor of legislation that there was some fair, just and reasonable connection between this limitation of the hours of labor of women under unsanitary conditions and the public health.

This case was followed in *Bailey* v. *People*, 190 Ill. 28, where it was declared that an act discriminating against lodging houses and in favor of hotels was unconstitutional and this case and many other Illinois cases were cited. This case cites all the recent Illinois cases on the subject and it will not be necessary to comment upon them further.

The case of *Harding* v. *Glucose Co.*, 182 Ill. 551–621, citing *Ford* v. *Chicago Milk Shippers' Assn.*, 155 Ill. 166, holds that the anti-trust act of June 11, 1891, adopted by the Legislature of that state is constitutional—a proposition since re-affirmed in a recent unreported case. That is immaterial here, as the accused are not charged under any such act, nor with attempting to engross, monopolize or restrain trade, but with malicious injury to the business of a competitor.

The case of *Booth* v. *People*, 186 Ill. 43, is of special importance as it was afterward affirmed by this court. That was a prosecution brought under section 130, Criminal Code of Illinois, which prohibits dealing in options on grain, stocks and other commodities.

This statute was attacked as an unwarranted interference with the liberty of contract, condemned by the constitution of Illinois and by the Fourteenth Amendment of the Constitution of the United States. But it was sustained and upon this idea: that it was a law enacted for the suppression of gambling and having a direct and necessary connection with that end. The fundamental idea which runs through the opinion of the court in this case is that this forms a well recognized exception to the general doctrine upon the subject; that is to say that, to the general rule that the right to make all contracts not illegal or immoral

at the common law and which therefore may be regarded as innocent in themselves, is protected by organic law and by this particular provision of the Federal Constitution. There are well settled exceptions; a wagering contract was not void at common law, yet there has never been any doubt of the constitutional power of the Legislature to prohibit such contracts and to punish those who enter into them, as well as to declare the invalidity of the contracts themselves. In the case referred to the court said:

"Laws for the suppression of all forms of gambling have, without exception, so far as we are advised, been regarded by the courts and law-writers as a proper exercise of the police power."

And again:

"The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil and that the suppression of such evil is within the proper exercise of the police power, has been too frequently declared to be open to discussion."

The court also held that the denial of the right to make such option contracts, tended materially to the suppression of the evil of gambling in grain options, which it was the legislative intent to extirpate.

The opinion of this court, by Mr. Justice Harlan, proceeds upon similar lines. *Booth* v. *Ill.*, 22 S. Court Rep. 425.

The learned justice there said, page 427:

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be reached

unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals, has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

And further:

"It must be assumed that the Legislature was of the opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be obtained and which it was competent for the state to accomplish."

From this judgment there was dissent, but no dissenting opinion. It may be presumable to conjecture that this dissent was based upon the idea that while the State Legislature might prohibit gambling in grain, this statute went beyond the necessities of the case and struck down contracts which had no necessary connection with such illegal operations.

Now, there are numerous subjects upon which the right of the Legislature to interfere with the right of contract is recognized; the rate of interest is one subject; the contracts of seamen and sailors are subject to similar regulations. These are, however, in the nature of exceptions to the general rule and these exceptions should not be multiplied or extended.

In *Allgeyer* v. *Louisiana*, 165 U. S. 580, this court held a statute of Louisiana unconstitutional when construed by the Supreme Court of that State to prevent an owner of cotton in Louisiana from sending to an insurance company of another State, not authorized to do business in Louisiana, an order by mail for insurance on the cotton to be shipped to a foreign port in

pursuance of a valid contract for such insurance previously made and to be performed in the other State.

Mr. Justice Peckham, writing for the court in that case, said:

"The Supreme Court of Louisiana says that the act of writing within that State the letter of notification was an act therein done to effect an insurance on property then in the State in a Marine Insurance Company, which had not complied with its laws and such act was, therefore, prohibited by the statute. As so construed, we think the statute is a violation of the 14th Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the Constitution of the Union.

"The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential, to his carrying out to a successful conclusion, the purposes above mentioned."

This liberty, these rights, are not only essential and fundamental; they are not only declared in the Declaration of Independence and plainly consistent with and demanded by the very spirit of American free institutions, but they are and were by this court in that case declared to be constitutional rights secured by the organic law of the Nation and above and beyond the power of state legislators; state legislation can not defeat nor annul them.

It has not seemed necessary to particularly examine the

cases decided in this court under the Sherman Anti-trust Act of 1890. They have been so recently decided and are so familar to the court that they can by no possibility be overlooked, in so far as they are material. These cases are *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S. 505; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 212–249.

However, it may not be improper to say that the views of this court, as announced in the last of these cases, seem to take cases of this character arising under congressional statutes passed to regulate state and foreign commerce entirely out of the category of cases under consideration in this argument; for this court has explicitly declined assent to the proposition that the constitutional guaranty of liberty of contract to the individual, secured by the Fifth Amendment to the Constitution, in anywise limits the power of Congress in respect of, or prevents it from legislating upon, the subject of contracts relating to interstate commerce; and has explicitly declared that the right of Congress to legislate upon this subject is entirely unfettered by this amendment; that the commerce clause qualifies the right secured by the amendment in this regard, and the amendment does not qualify the right to legislate under the commerce clause.

Page 234–235 in the case last referred to, this court said:

"We conclude that the plain language of the grant to Congress of power to regulate commerce among the several states, includes power to legislate upon the subject of those contracts in respect to inter-state or foreign commerce, which directly affect and regulate that commerce and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants."

And again, at page 229 it is said by Mr. Justice Peckham for the court:

"On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely and collaterally regulate to a greater or a less degree commerce among the states."

In a recent case in the Circuit Court for Nebraska, Judge Smith McPherson of the Southern District of Iowa held that the Nebraska Anti-trust Act of 1897 in its general scope exceeds the powers of the state and is unconstitutional and void as depriving persons of their liberty in violation of the Federal Constitution, which includes liberty to make and enforce contracts, that being a fundamental right of the citizens of the United States.

The question arose on a bill filed by a number of fire insurance companies organized under the laws of various states and doing business in Nebraska, to enjoin the officers of that state from enforcing this law, the complainants having employed a kind of a commissioner to fix insurance rates and agreeing to be bound by such rates as he should fix; and it was apparently this arrangement which the officers of Nebraska insisted was a violation of the statute. In that case the learned judge remarked:

"The Railroad Traffic Association case, 166 U. S., 290, by the United States Supreme Court, has been strongly urged by the attorney-general as upholding the doctrine of this statute. But it does not for the reason that the statute under consideration in that case was upheld by reason of the commerce clause of the Constitution, and to that extent the commerce clause controlled the other clauses of the Constitution, and I repeat that the statute

with which I am dealing, is a state statute." *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. 816.

The learned judge, after reciting in a general way the provisions of the statute, makes a picturesque and forcible arraignment of it which is not inapplicable to all legislation of this class. He says:

"If this statute is valid, two men in the same line of business in the same town or village can not form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the price is maintained. This statute is not a step, but it is a long stride, hundreds of years, backward, when monarchs, cabinet officers, and even parliament decreed the price to be paid for a day's labor, and the cost of all the necessaries of life, even to the loaf of bread. Any one with but the slightest knowledge of history will recall what tyranny and brutality existed in England by reason of such laws and in France down to the Revolution. If this statute is valid, the next step may be, and can be and probably will be, the granting of exclusive rights to certain persons, only, to pursue an occupation. It would be probable because those let in would be the more thrifty. Drive out three-fourths of the barbers, or waiters or carpenters or blacksmiths and those remaining would be thrifty, even at the old price. Competition and contracts would be at an end. If we can not acquire property, then we have a government of socialism. And how can we acquire property or enjoy the property we do have, without the right of contract? If this law is valid, two or more farmers can not agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers can not agree that the live-stock feeder shall not have their corn, only at a certain price. Blacksmiths can not agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, gardener, the contractor, consumer or laborer to prevent the reduction of price. Can it be possible that such legislation is

valid? If it is valid then what becomes of the provision, 'No man shall be deprived of the equal protection of the law,' or of that other provision, 'No man shall be deprived of life, liberty or property without due process of law?'

Justice Field once said: 'The right to pursue them without let or hindrance is a distinguishing privilege of the citizens of the United States, and an essential element of that freedom which is their birthright.' Another justice of the United States Supreme Court said: 'Yet the power does not and can not extend to prohibiting a citizen from making contracts, and this is institutional law in England as well as America.' Another great judge has said: 'Liberty includes the right to acquire property and that means and includes the right to make and enforce contracts.' And I dare say that there is not an Appellate Court in this Union but has given a like definition of liberty, 'the right to make and enforce contracts.' Without it, in the language of Justice Miller, emphasized by Judge Dillon, already quoted, 'And there is no doubt that, if this clause were removed to-morrow, this Union would fall to pieces.' We could not exist as a free people, but would be the slaves to every legislature that could be carried off its feet by first one public clamor and then another. Parties can not only make contracts, but they may violate them, subject to being held responsible in damages. It will be recalled that a few years ago one of the United States judges issued an injunction in effect prohibiting employes of a railroad from agreeing in a body to quit work. The Court of Appeals of the Seventh Circuit, presided over by Justice Harlan, of the Supreme Court, reversed the decision, in effect holding that it was lawful for the employes by agreement to quit in a body because their wages had been cut down. Citations could be made at great length from jurists and statesmen, practically without conflict, as to the right of contract being the greatest of all blessings enjoyed by a free people, and guaranteed us by the Constitution so long as that instrument may last."

While the opinion of the learned judge was evidently written "*dum fervet opus*," it nevertheless contains a stalwart and

breezy assertion of the right of individual liberty, which should not be lightly passed over.

In a very recent case in this court Mr. Justice Holmes has said:

"If the state thinks that an *admitted evil* can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere, unless in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'"

Otis v. *Parker*, 23 Sup. Ct. Rep. 168–170.

Regarding some measure of combination or concert of action as indispensable in all competitive effort on a large scale, it can not be said that such combination, much less the competition which it promotes, is an "admitted evil," though it may be hostile and injurious to those rivals in trade at which it is aimed. The difficulty in admitting the principle contended for by the state is that it at once removes all constitutional limitations upon the power of the state in this field of legislation.

While in the case just referred to Mr. Justice Holmes employed the language quoted he also declared it to be true "that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts."

The case in hand was strictly within the principle of *Booth* v. *Illinois*. The Constitution of California, as a means of checking the evil of gambling in stocks, declared all contracts for sales of stock on margins to be void, and permitted recovery of moneys paid thereon; and this was held within the power of the state.

It must be the true rule for the construction of the Four-

teenth Amendment that it secures to the individual not only life and property, but liberty, in its broadest sense, including the right to pursue all lawful avocations, to acquire property, to trade, enter into contracts, etc.

These rights are perhaps to some extent subject to the police power of the state.

It may not be possible nor even desirable to attempt to indicate definitely and precisely the limits of this power. That those limits exist is quite clear; as, if they do not, the constitutional guaranty secures nothing, and all these essential rights are held entirely subject to the power of the state. To say, for instance, that a person, under this guaranty, is absolutely protected in his right to make all lawful contracts, and then to add, that whether or not a given contract is lawful depends entirely upon the legislation of the state in which the contract is made, is simply to announce that the Federal Constitution secures nothing of liberty in this regard, but that the authority of the state is plenary and paramount.

Certainly, state legislation to promote the public health (*Powell* v. *Pennsylvania*, 127 U. S. 678), to secure public safety (*Smith* v. *Alabama*, 124 U. S. 465), to prevent gambling transactions injurious to the public morals (*Booth* v. *Illinois* and *Otis* v. *Parker*, *supra*), is admissible and has been repeatedly sustained in this court. These are well recognized heads of proper legislative and local authority in the exercise of the power of the police. But when it is attempted to go beyond this—to proscribe absolutely all combination or concert of action in the competitive struggles of ordinary trade and commerce, which tend to injure and are intended to injure rivals in trade—all just notions of the

legitimate bounds of the police power are abandoned and such legislation becomes odious, paternalistic, and offensive in the highest degree.

Men are in a measure able to combat assaults upon their liberty of action which proceed, as in cases of competition in trade, from those on an equal footing. This liberty is more obviously in danger when assailed by governmental action.

A great political philosopher has well said:

"Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public counsel to find out by cautious experiments, and rational, cool endeavors, with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened."

Burke, 2 Wks. 229.

Another great man, a distinguished American lawyer and statesman has said:

"It is no part of the duty of a state to coerce the individual man except so far as his conduct may injuriously affect others, not remotely or consequently, but by direct invasion of those rights which are guaranteed by law and which the law must therefore recognize and protect."—SAMUEL J. TILDEN.

I quote in a measure from memory, and have no means of exactly verifying the language quoted. The substance is as given, and I think the exact language.

I shall now proceed to the consideration of the last question in the case, which is, conceding for argument only, the power of the state to interdict such conduct as is charged against the accused, is the statute in question a legitimate and constitutional exercise of that power.

III.

In discussing this point it will be necessary to consider the extent to which, if the judgment of the court below is sustained, it will be admissible for the states to infringe upon the rights sought to be secured by the Fourteenth Amendment.

The effect of the last three amendments was first considered in the *Slaughter House Cases*, 16 Wall. 36–130; and it is a singular fact that in the great debate in that case between those giants of the bench, Miller, Bradley and Field, the invalidity of the legislation of Louisiana in question was nowhere distinctly asserted, upon the ground that it deprived individuals in that state of liberty, although the rights of citizens, state and national, were fully discussed.

The authorities cited illustrate how the law has progressed since this first memorable occasion.

The statute in question already quoted aims its denunciation at "any two or more persons who shall combine * * * together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever;" *i. e.*, thus injuring, *inter alia*, the trade or business of another.

Nothing is more certain than that such injury by some means has always been lawful, is clearly moral and most undoubtedly within constitutional protection. At least this is so, unless the whole competitive system is unlawful and immoral. If a just application of the golden rule requires every merchant to seek trade for his competitor, every manufacturer to turn over his orders to another, every physician to direct his patients to his

professional rival, every publisher of a newspaper to send his advertisers to the business office of another journal, then it may be plausibly contended that in competition itself there is something essentially immoral to which the power of the police may justly attach. Such views can not be regarded as "counsels of perfection;" they are rather the suggestions of lunacy. In these days of organization, concert of action is an indispensable element in the conduct of business. Indeed it always has been. It is found in every instance where one man employs another; it is perhaps further developed in partnerships and finds larger expression in great corporate organizations. Now I affirm that the right to combine to injure a rival in business by diverting his trade by lawful means, is a constitutional right, a part of the liberty secured to individuals by the Fourteenth Amendment. It is an indispensable adjunct to the right to pursue a lawful vocation and the liberty of action in connection therewith which is necessary in order to any possible chance for success.

It may be, I do not debate that question, that the public interest requires the absolute extinction of this liberty and the erection of the dull, monotonous and gloomy fabric of state socialism, *moles ingens, immanis*, upon the ruins of industrial liberty and the competitive system. But will any, even the most benevolent, paternal and radical advocate of such a change contend that it can be inaugurated without radical innovations in organic law both state and Federal? I think not.

The decision below, with great deference to the learned court which pronounced it, is a step in the wrong direction. The legislation of the state construed in favor of liberty, loosely worded

though it was, might possibly answer every reasonable and legitimate purpose of its framers in reaching admitted evils and correcting conceded abuses. As construed by the court it becomes an instance of that meddlesome and odious interference with the methods of business universal among our people, which occasionally work, as in this instance, great hardship and injustice to individuals, but are quite inadequate to affect general conditions.

There is no question of restraint of trade or the validity of any contract tending to monopoly in this case. No statute of Wisconsin having any relation to these subjects is invoked. The case rests wholly on Sec. 4466a, statutes of 1898, to which reference has been frequently made.

I have before adverted to the fact that although the information in this case charges the acts counted upon as done maliciously and the opinion of the court below seems to turn largely upon this point, the statute assailed imposes no such requirement. The offense created is complete if done either "willfully *or* maliciously." "Willfully" as here used means "knowingly" or "intentionally." Therefore if this statute be upheld, a person who, absolutely without malice—*i. e.*, a wicked purpose to injure without lawful excuse, even with a sincere disposition to avoid such a necessity, as a last resort to save himself in the fierce struggle for existence, intentionally combines with another to promote his own business at the expense and thus to the injury, of a rival, is clearly guilty of the offense created, and must suffer the penalty denounced. It matters not what form this combination or concert of action may take nor how innocent the means employed. For the statute declares the offense, if the concert be to injure another willfully by "*any means whatsoever.*" If two merchants

join in issuing a trade bulletin or advertising sheet to promote their several enterprises at the expense of loss of trade to another, they are within its ban. If the directors of a business corporation endeavor to hire a competent man from a rival who will take some of the latter's trade, they are clearly guilty. If a firm of lawyers, for the same reason seek to induce a member of another firm to join them, they must be punished.

If the partners or directors of a large mercantile house agree to try to hire an efficient salesman from a rival house, they certainly have committed an offense. Indeed, it seems equally clear that if the elders, vestrymen or others in charge of a large church should attempt to secure some popular clergyman from another congregation, in order to attract some of his following, they are, if not felons, at least guilty of a grave misdemeanor under this statute.

It is not necessary under its plain prescription that the combination should be wrongful. Neither this word nor the term wrongfully is found in the statute. It is not necessary that any illegitimate, illegal, improper or immoral means shall be employed; "any means whatsoever" declares the law. It is not requisite that the concert charged should be malicious. It is within the statute if willful or malicious; "willfully *or* maliciously" being the exact language employed.

If such a statute can be sustained then the constitutional right to liberty secured or attempted to be secured by the organic law of the nation is "a delusion, a mockery and a snare." It means nothing. The states may override it at their will; and the tribunals of the nation must sit idly by and view, in judicial

impotence, the fantastic and discordant proceedings of the legislatures of forty-five separate states.

This is an age of legislation; of law-making on every conceivable topic. The old idea once somewhat in favor that that government governs best which governs least seems to have been entirely abandoned. Space does not admit of citation to sustain what is common knowledge and requires no authority for its support. But if any member of this court desires other verification than his judicial experience affords, let him glance over the addresses of the presidents of the American Bar Association for the last few years.

Mr. Justice Field, in speaking of the privilege and immunity clause of the Constitution, once said, with that felicity of expression which marked his judicial utterances:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. * * * It insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Paul v. *Virginia*, 8 Wall, 168.

But if so much may be said and justly said of that provision, what shall be said in similar vein of the Fourteenth Amendment to that instrument? Slowly and steadily it has worked almost a revolution in the relation between the states and the general government.

In *Gibbons* v. *Ogden*, 9 Wheat. 189, Chief Justice Marshall

in expounding the commerce clause of the Constitution and defining the general scope of that instrument, said:

"The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

Now by this amendment the essential rights of the individual, unless forfeited by due process of law, are placed beyond the power of the state and made the subjects of national cognizance and protection.

So frequently has successful resort been made to its guaranties that when great questions depending on its construction are debated, we scarcely pause to reflect on how differently they must have been resolved had they arisen before its adoption.

I can not now digress to illustrate this; but the great Nebraska rate cases,

Smyth v. *Ames*, 169 U. S. 466,

show how radical is the change involved; and a study of previous decisons will demonstrate how gradually this court advanced to the ground taken in that case; ground which will never be abandoned.

In these brief lines, applying to the states limitations which the original amendments attached to the exercise of national power, it is declared, "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For the first time the adoption of this amendment created *magna charta* of national constitutional liberty. It is of course conceivable that the mere existence of this Federal guarantee has tended to relax the vigilance of the friends of liberty in respect of state legislation. But this suggests only further vigilance in its enforcement at the hands of national authority.

This amendment is a new declaration of independence; a great national bulwark against invasion of the essential rights to life, liberty and property which extends not merely to citizens but to every person within this broad land and, let us hope, in all its territories beyond the seas. It is and should be a shield and protection to every one against oppressive, injurious and meddlesome interference by the states with the inalienable rights of men.

In the case from which I have already quoted, Lord Mansfield refers to King's Bench as the "general censor and guardian of the public manners."

This is, in a land of freedom, the office neither of court nor legislature. To such an idea the dictum of the late Lord Herschell, already quoted, may well be opposed. "I am not behind my noble and learned friends in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful." *Allen* v. *Flood*, already cited.

I must confess to some difficulty in understanding how the learned court below was betrayed into the use of such inaccurate language as marks discussion of the statute in question. In the concluding portion of the opinion it is said: "The term 'malicious injury' as used in the statute is synonymous with that

term at the common law." It might be quite material to define that term if it were found in the statute; but it is not. And as already pointed out, malice is not a necessary ingredient of the offence created by this statute. I have read and re-read it carefully and find nothing whatever to warrant the language of the court.

The statute says nothing whatever about "malicious injury." It does very plainly and clearly declare that two or more who "willfully *or* maliciously" combine to injure, shall be punished. Willfully means intentionally, and is distinguished from maliciously in that it does not import an *evil* mind or intent.

2 Bouvier's Law Dictionary.

In the statute it is thus employed disjunctively, indicating that this distinction was present in the legislative mind. Inasmuch as the information distinctly charged malice, possibly the learned court regarded any critical examination of the statute in this regard as immaterial.

It is true, malice seems to be required by the statute where persons combine to compel a person to do an act against his will; but the information imputes no such combination to the accused. It would appear somewhat from the opinion as if the learned court held the accused guilty of everything charged, without careful examination of the statute to see whether it was constitutional upon a sound construction of its language and irrespective of the case before the court; and that then, reversing this process, the court was disposed to hold the accused for a crime covered by the statute but not by the information.

For the opinion, declaring the primary end of the combina-

tion to be to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, remarked that one of these alternatives (obviously the former) would result in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, etc., a conspiracy to do this being an offense contemplated by the second clause of the statute.

To this latter offense malice is essential; but the information charges no such offense. The accused can only be properly convicted under a valid statute and upon a criminal accusation showing its violation. It is not sufficient that the statute is valid in so far as it imposes a penalty for conduct not alleged against the defendant; nor, in examining its validity, can its terms be aided by reference to the information. In other words, it is not sufficient to say the accused, if guilty as charged, might be convicted under a statute framed to cover such a charge. For we are now considering the validity of this particular statute; and that must be determined by its language, and not by that of the information.

There may be freedom from competitive assault somewhere; but it does not exist in any jurisdiction with which I am familiar; and where it does, trade and commerce will be stagnant and dead.

Indeed, with deference to the learned court, the idea that the way to promote freedom is to impose more restrictions, and that by the strong hand of governmental power, is fundamentally erroneous.

The constitutional restrictions imposed by the framers of organic law were aimed at governmental action. The people and

the statesmen who led them believed, and rightly, that against the efforts of individuals either singly or in combination there was nothing of danger to society requiring constitutional provision. And so all the limitations in the organic law of the nation are imposed upon governmental action either by the several states or by the various repositories of national power.

At this time the tendency is strong to regulate everything by law. Never has there been a time in our modern history, except possibly during the civil war, when it was more important to the nation that these limitations should be observed nor when they have been subjected to greater strain.

The opinion of the learned court below seems to be addressed largely to the power of legislation, national and state, in respect of combinations and contracts in restraint of trade. No one doubts that some such power exists.

But I deny the power of either nation or state absolutely to prohibit all concert of action in private competitive business; and still more to declare that every effort in that field by two or more to injure, without malice or wrong, a competitor, in his business, by any means, whether lawful or unlawful, shall be punishable as a crime.

Again, I repeat, some concert of action, some combination or co-operation is indispensable to any success in modern business. Liberty to enter into it must be conceded. That it may be regulated by state and federal authority is quite probable; that it can not be abrogated entirely is absolutely certain.

It is not less true that the effect of such concert so far as it is at all effective is to injure competitors or rivals in business. Such is its purpose in most cases; and as an inevitable consequence in

every instance where it succeeds, such may be regarded as its object in all cases.

Now all such concert, whether wrongful or not, willfully to injure, is prohibited by this statute. It is so prohibited, if attempted, not only by unlawful means, but by any means whatsoever. This is therefore no regulation of the exercise of a constitutional right but an absolute denial of it.

This statute is not aimed at contracts in restraint of trade nor contracts nor arrangements tending to monopoly.

It is not restricted to prohibition of "combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade." This ponderous phrase, employed by the court below, may or may not well describe the conspiracy charged against the accused; but it certainly is not, nor is its equivalent, found in the statute. The statute is not restricted to any such conduct.

It is not aimed apparently at "malicious combination," at "wrongful combination," at combination such as the court holds may be prohibited; but absolutely at all concert of action or cooperation entered into knowingly to injure the business of another and build up that of those undertaking it.

That is, so the learned court holds, and, no doubt, this court must take the statute as thus construed.

Wabash, etc., R. R. v. *Illinois*, 118 U. S. 557–596.

Of course, in my opinion, the statute was never designed nor intended to have any such application. But if it admits of such construction, it is clearly an unwarranted invasion of the liberty guaranteed by the Fourteenth Amendment.

In criticising the opinion of the court below on *habeas corpus*, I have indicated that no evidence was offered on that hearing in the Circuit Court. This is literally true as to plaintiff in error, but not as to Messrs. Aikens and Huegin. It appears that as to them the evidence taken in police court was offered; but the Circuit Court decided the case wholly on the sufficiency of the complaint; and the Supreme Court expressly says that, had that court gone further and examined the evidence, the result would not have been different, as the evidence only tended to establish the truth of the complaint.

This being so, the suggestion by the Supreme Court that there was some proof that the accused made the agreement to maliciously injure the Journal Company, as charged, appears to me irrelevant as the case then stood, as it was clearly inaccurate as to Mr. Hoyt.

But on this writ of error this remark, whether before applicable or not, is not now, because the judgment complained of was entered against plaintiff in error and the others accused without any evidence, Mr. Hoyt demurring to the information, and the others pleading something in the nature of confession and avoidance, no proof as to either being offered.

I am well aware that this argument is too long. It is a fault not uncommon in such efforts. I will not further protract it except to say that this is a case of importance to the accused. It may be safely assumed that they are not habitual criminals nor indeed properly classified as belonging to the criminal classes. Having done that which I think the court knows judicially, is common and quite generally regarded as legitimate in ordinary trade competition, they find themselves, under a strained con-

struction of a novel statute, condemned as malefactors and adjudged guilty of crime. It is clearly their duty not to rest under this imputation so long as the Constitution and laws of their country afford opportunity to seek relief from it. Such a stigma is not to be lightly regarded nor willingly borne by any self-respecting man. It is not a desirable heritage for his children; it is not a pleasant memory as he looks back upon a life, possibly of honorable and honest endeavor, spent in an important and useful calling.

That such results are possible under the views of the learned court below is in itself enough to suggest grave doubts of their propriety.

If the law so decrees, then the parties thus condemned must bow in submission. But they would be unworthy of the rights to liberty which they claim, did they not resist to the uttermost such a harsh and injurious conclusion.

Respectfully submitted.

CONRAD H. POPPENHUSEN,

JOSEPH L. MCNAB,

Attorneys for Plaintiff in Error.

S. S. GREGORY,

Of Counsel.

APPENDIX.

Supreme Court of Wisconsin.

State ex rel. Durner, Sheriff, v. *Huegin.*

Same v. *Aikens.*

Same v. *Hoyt.*

Opinion filed April 30, 1901.

Error to circuit court, Milwaukee county; Robert G. Siebecker, Judge.

Applications of Albert Huegin, Andrew J. Aikens, and Melvin A. Hoyt for release on habeas corpus. From orders discharging them on habeas corpus the state, on the relation of George Durner, sheriff, brings error. Reversed.

Writ of error to the circuit court for Milwaukee county to review orders thereof, in habeas corpus proceedings, discharging certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd, of the city of Milwaukee, in said county of Milwaukee, being severally first duly sworn, complain to the police court for the city of Milwaukee, Milwaukee county, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said county of Milwaukee, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of willfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business, and for the purpose and with the intent then and there of willfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said the Journal Company at all of said

times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said the Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subsequently thereto, the said the Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large portion of the revenue of said the Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said the Journal Company, and financially interested in the business and success of said the Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said the Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said the Journal Company and of the said the Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said the Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said the Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900, said the Journal Company in good faith established a new rate

for advertising in said the Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said the Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per cent above that which was charged by said the Journal Company for like advertising in the year 1899.

"That at all of said times the said Andrew J. Aikens was and now is, the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said the Milwaukee Journal; that at all of said times said Albert Huegin was, and now is, the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was, and now is, the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said the Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of willfully, maliciously and unlawfully injuring said the Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said the Milwaukee Journal, should pay or agree to pay to said the Journal Company the increased rate for advertising established

or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said the Milwaukee Sentinel, the Evening Wisconsin, and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five per cent in excess of what said last mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said the Journal Company the said increased rate established by it as aforesaid for advertising in said the Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said the Milwaukee Journal, were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt; that many of the patrons and advertisers in said the Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said the Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, con-

federation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said the Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said the Milwaukee Journal, greatly to the injury of the business and trade of said the Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Wisconsin.

"Wherefore, affiants pray that the said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the defendants guilty of such offense. Each defendant refused to give bail for his appearance before the municipal court of Milwaukee county for trial, whereupon he was duly committed to the custody of the sheriff of such county to await such trial. A

commitment was delivered to the sheriff, as to each defendant, all being in the same form. The following is one of such commitments:

"IN THE POLICE COURT OF THE CITY OF MILWAUKEE.

STATE OF WISCONSIN, } ss.
Milwaukee County. }

"*The State of Wisconsin to the Sheriff, or his Deputy, or to any Constable or Policeman, and to the Keeper of the Common Jail of said County:*

"WHEREAS, Albert Huegin has this day been brought before the police court of said city, charged on the oath of Lucius W. Nieman and Lloyd T. Boyd with having on or about the fifth day of April, A. D. 1900, at the city and county of Milwaukee, committed the offense of conspiracy to injure.

"And whereas, an examination of the said Albert Huegin has been held before said court, and the said court being satisfied that an offense has been committed as charged in said complaint, and that there is probable cause to believe the prisoner guilty thereof, whereupon the said court did require the said Albert Huegin to recognize with sufficient sureties in the sum of five hundred ($500) dollars, for his appearance before the municipal court of said county, at the present term thereof, for the year 1900, and not depart said court without leave. And the said Albert Huegin having failed to recognize in due form of law.

"Now, therefore, in the name of the State of Wisconsin, you are hereby commanded forthwith to convey and deliver into the custody of the said keeper of the common jail, the body of the said Albert Huegin, and you, the said keeper, are commanded to receive the said Albert Huegin into your custody, in the said jail, and him there safely keep until he shall recognize as aforesaid or shall otherwise be discharged by due course of law.

"Witness, the Honorable Neele B. Neelen, justice of the police court of said city of Milwaukee, this 30th day of June, in the year of our Lord one thousand nine hundred."

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the Circuit Court for Milwaukee County a writ of habeas corpus to test the

legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

Albert Huegin, one of the defendants, traversing the return of the sheriff, alleged that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate for the reasons set forth in his petition for the writ. Such reasons were, in substance, that the complaint failed to state facts sufficient to constitute a criminal offense. Melvin A. Hoyt, another of the persons in custody, demurred to the return to his writ, for insufficiency. Andrew J. Aikens interposed a traverse similar to that of defendant Huegin. On the hearing on behalf of defendants Huegin and Aikens, and in support of their pleas to the return of the sheriff, the evidence and proceedings had in the police court were offered and received in evidence. The commitments were also offered and received in evidence. The district attorney then moved the court that James G. Flanders and William H. Austin, attorneys of the court, be allowed to appear as counsel for the sheriff. The motion was denied upon the ground that *habeas corpus* proceedings are criminal in character, or involve an inquiry into a criminal proceeding, and that the duty devolves solely upon the district attorney to represent the state, the real party, in such a matter, the sheriff not being a party to the proceeding at all.

The court then decided that the proceedings which resulted in the several commitments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages, against the members of the combination, in case its purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

After returns were filed to the writs of error issued out of this court, a motion was made on behalf of the sheriff of Milwaukee county for leave to be heard by private counsel, which motion was opposed by the defendants in error.

E. R. HICKS, Atty. Gen.; HOWARD VAN WYCK, Dist. Atty.; A. C. UMBREIT, Asst. Dist. Atty.; WINKLER, FLANDERS, SMITH, BOTTUM & VILAS, and W. H. AUSTIN, for plaintiff in error.

VAN DYKE, VAN DYKE & CARTER, for defendant in error Huegin.

W. H. TIMLIN, for defendaut in error Aikens.

N. S. MURPHEY, for defendant in error Hoyt.

MARSHALL, J. (after stating the facts). Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, or discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require

them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation and endeavor to make the conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by section 163, Rev. St. 1898, to appear for the state and prosecute or defend all proceedings in the Supreme Court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the Supreme Court as it is as to the district attorney in the Circuit Court. (3) The sheriff is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions.

1. If the sheriff of Milwaukee county by whom the state sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such, he can not be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such can not be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was

a party to the proceeding in the trial court. We can not sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the habeas corpus proceedings, he is a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (section 3048, Rev. St. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, Id. A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment or execution, in suit," said Justice Grier, in *Bayard* v. *Lombard*, 9 How. 530, 13 L. Ed. 245, quoting from early common law writers. See, also, 7 Enc. Pl. & Prac., p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel* v. *State*, 71 Wis. 444, 37 N. W. 244; *State* v. *Duff*, 83 Wis. 291, 53 N. W. 446, and other cases. Whether habeas corpus proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by habeas corpus is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrongful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful

act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826, opinion by Waite, C. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross* v. *Burke*, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896, the court, speaking by Fuller, C. J., said: "It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except for assault and battery (section 752, Rev. St. 1898), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public

expense. That has often been decided. *McDonald* v. *Milwaukee Co.*, 41 Wis. 642; *Board* v. *Sullivan*, 51 Wis. 115, 8 N. W. 12; *Cutts* v. *Rock Co.*, 58 Wis. 642, 17 N. W. 636; *State* v. *Duff*, 83 Wis. 291, 53 N. W. 446; *Frederick* v. *Douglas Co.*, 96 Wis. 411, 71 N. W. 798. But it has nowhere been decided that the state's attorney, either of the county or the state at large, can not obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald* v. *Milwaukee Co.*, *supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by section 3433, Rev. St. 1898, which provides that when it appears from the return to a writ of habeas corpus that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the district attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative can not claim compensation for his services except as against the individual employing him. That is as far as the decisions of this court go. No reason is perceived why a reputable attorney in a mere civil action can not be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation of any right secured by the Constitution or any law, to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown

by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis. 1; *In re Falvey*, 7 Wis. 630; *In re Pierce*, 44 Wis. 411; *In re Eldred*, 46 Wis. 530, 1 N. W. 175; *State* v. *Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776; *State* v. *Ryan*, 70 Wis. 676, 36 N. W. 823; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

3. What has been said goes upon the theory that the state is the only party interested in habeas corpus proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we can not agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of habeas corpus is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of section 2629, Rev. St., 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by mandamus and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of section 2595, Id. In *Ex parte Tom Tong*, supra, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this court declared, in *Paine* v. *Chase*, 14 Wis. 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State* v. *Jennings*, 56 Wis. 113, 14 N. W. 28, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so-called within the meaning of the code, because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (section 2594, Rev. St. 1898) and that a civil action shall be commenced by the service of a summons (Sec. 2629, Id.). But the grant of power to circuit courts to issue writs of *habeas corpus* and *mandamus*, among other common-

law writs, contemplated their use for the purposes they were devoted to before the adoption of the code, *i. e.*, for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and can not be changed by any legislative enactment. Whether the issuance of such a writ be called by the code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes* v. *Jennison*, 14 Pet. 540, 564, 10 L. Ed. 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an Appellate Court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right—within the meaning of section 2595, Rev. St. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State* v. *Smith*, 65 Wis. 93, 26 N. W. 258), and with *State* v. *Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to establish the law for this state, and has been abrogated by statute (section 3043, Rev. St. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his

conduct. They were, to all intents and purposes, plaintiffs, within the meaning of section 2601, Id., regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceeding, regardless of the name by which such a party is commonly known. The statute (section 2595, Id.) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. Section 2603, Id. The term "party to a suit (or action)" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraining them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Prac., p. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, section 3436, Rev. St. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where same question is material. *In re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People*

v. *Brady*, 56 N. Y. 182; Hurd, Hab. Corp., Sec. 386. That doctrine was based on a supposed common law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. Church, Hab. Corp. (2d Ed.), p. 577; *Ex parte Cuddy* (C. C.), 40 Fed. 62; *Perry* v. *McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Section 3437, Rev. St. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (section 3043, Id.), effectually changed the common law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty* v. *Board*, 61 Wis. 1, 20 N. W. 654; *People* v. *Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant* v. *Thompson*, 128 N. Y. 427, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a proceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty* v. *Board*, a decision of the board of supervisors had been reversed on writ of certiorari and the board attempted to appeal In *People* v. *Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the

cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State* v. *Wolfrom*, 25 Wis. 468; *Moede* v. *City of Stearns*, 43 Minn. 312, 45 N. W. 435; *People* v. *Jones*, 110 N. Y. 507, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the Circuit Court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, does the warrant of commitment state any offense known to the laws of this state? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the court charged on oath with committing the offense of conspiring to injure, and that such court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe suchpers on guilty thereof—shows an adequate cause for holding such person for trial. Defendants in error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in section 4466a, Rev. St. 1898. Counsel do not state the rule of certainty, which they contend the commitment should be tested by, in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than

one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of willfully or maliciously injuring another; that it did not literally follow the statute; and that it did not conclude in the form of the statute in such case made and provided.

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins* v. *Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. "It is not necessary," said the court, "in such an instrument, to set forth the facts constituting the offense particularly. * * * It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient." In *State* v. *Everett*, Dud. (S. C.) 295, a case often referred to by courts and text writers, the com-

mitment under consideration merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan, supra*, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference is there made to a form for commitment prescribed by statute, which is however substantially identical with one which, it is said in section 4774, Rev. St. 1898, may be used. The California Court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins* v. *Brackett, supra*, and the cases to which we will presently refer, referred to the same authorities for support, *i. e.*, 1 Chit. Cr. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chit. Cr. Law, 111: "It is necessary to set forth the particular species of crime * * * with convenient certainty. * * * If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felon briefly, as for felony of the death of J. S. or for burglary in breaking the

house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And * * * there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in Wilkes' Case, 2 Wils. 153–159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons, Number 45," tending to inflame the minds and alienate the affection of the people from his majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the court, on a *habeas corpus*, might be able to fix the quantum of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without stating what he said or did, is sufficient. It is, however, in general advisable to describe the offense concisely but in substance as an indictment." There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Ex parte Howard*, 26 Vt. 205; *People* v. *Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Willoughby*, 14 Nev. 451; *People* v. *Gray*, 67 How. Prac. 456; *State* v. *Killet*, 2 Bailey, 289; *In re Kelly* (C. C.), 46 Fed. 653; 4 Enc. Pl. & Prac., pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (section 4774, Rev. St. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the

offense of arson, burglary, larceny or murder, by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, *Collins* v. *Brackett*, and *People* v. *Johnson*, *supra*, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is section 4466a, Rev. St. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This court, in

Nichols v. *State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as a mere rhetorical flourish, adding nothing to the substance of the instrument, and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy* v. *State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. St. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and section 4774, Id., prescribes a form of commitment for trial that "may be used," which indicates that the offense should be stated "as in the warrant." The rule is that where a form is prescribed by statute it must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston* v. *Chesly*, 32 N. H. 564. But section 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter* v. *Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter* v. *Frank* one of those elements was omitted. The words in the form under discussion, "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the

case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense as created or declared in section 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated section 4466a, Rev. St. 1898, the Circuit Court none the less erred in discharging them—if the complaint upon which they were arrested charged an offense known to the law, and the record of the examination which the court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the court, in a *habeas corpus* suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Section 3429, Rev. St. 1898; *State* v. *Bloom*, 17 Wis. 521. It is also the duty of the court on *habeas corpus* to examine the com-

plaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church,Hab. Corp., Secs. 231, 236; *In re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *In re Louis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Nishimura Ekiu* v. *U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. Ed. 554. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but on the contrary the statutes of this state substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only jurisdictional defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman*, *supra*. Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial: "It is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." Page 114, 4 Cranch, and

page 567, 2 L. Ed. "This having been a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. * * * 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125, 4 Cranch, and page 570, 2 L. Ed. That declaration has always been adhered to by the federal courts and followed generally by all courts where jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our state constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It can not go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining

the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the Circuit Court had no jurisdiction to review the evidence, many of which are cases decided by this court. We have taken time to examine each of such cases and are unable to discover that they furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.), 96 Fed. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus: "The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*." The concluding language of the opinion is as follows:

"It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this court that upon *habeas corpus* proceedings only jurisdictional

errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, can not be considered, because, the court having jurisdiction of the subject-matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdictional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *In re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright* v. *Wright*, 74 Wis. 439, 43 N. W. 145; *In re Graham*, 76 Wis. 366, 44 N. W. 1105; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re Meggett*, 105 Wis. 291, 81 N. W. 419; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Eckart*, 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* can not reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence;

and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error. *State* v. *Whitford*, 54 Wis. 150, 11 N. W. 424; *State* v. *Dodge Co.*, 56 Wis. 79, 13 N. W. 680; *State* v. *Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see Church, Hab. Corp., §§ 237–247; *People* v. *Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Hardigan*, 57 Vt. 100; *In re Simon* (Sup.) 13 N. Y. Supp. 399; *State* v. *Hayden*, 35 Minn. 283, 28 N. W. 659; *People* v. *New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones* v. *Darnell*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with text books in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State* v. *Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common law rule it has been repeatedly

held, in states having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far as necessary to determine whether the magistrate acted upon competent evidence tending to establish the facts and also the introduction of new evidence on issue joined as provided. *People* v. *New York Catholic Protectory, supra; People* v. *Richardson*, 13 How. Prac. 92; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *People* v. *Tompkins*, 1 Parker, Cr. R. 224. In the report of *People* v. *Martin*, *supra*, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus: "In criminal cases where an indictment has been found the court, upon *habeas corpus*, can not go behind the indictment because there are no means of ascertaining upon what it was found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on *Habeas Corpus*, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear here, though, that chapter 147, Rev. St. 1898, was intended to cover the entire field of practice in *habeas corpus* suits so far as relates to original proceedings. The scope of section 3425, *Id.*, is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to the attention of the court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his

answer to the return, where such answer contains allegations rendering such proof competent. Sections 3427, *Id.*, precludes examination into the proceedings upon which the determination of the court was had in committing the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, *Id.*, refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it,—but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the Circuit Court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence taken before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, can not be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error Melvin A. Hoyt, that "where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not

reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect or the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at section 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the court as applicable to the facts of this case. Where an act is an offense, as that of adultery, a crime, it can not be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursus necessarius*—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursus necessarius* in that at least two persons are necessary to a combination or agreement. But there is also the element of *concursus facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of

it; in the other, concert, itself an offense, is a mere aid to the act which is the ultimate purpose thereof—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for it as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon v. *Com.*, 14 Pa. 226, and *Miles* v. *State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to the Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon* v. *Com.*, where an act is an integral offense and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons willfully and maliciously to injure the Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, *i. e.*, of injuring the business of the Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to willfully and maliciously injure the Journal Company in its business. Counsel admits that there is a dearth of authority

to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S.* v. *Stevens*, (D. C.) 44 Fed. 132; *U. S.* v. *Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *Reg.* v. *Boulton*, 12 Cox, Cr. Cas. 87; *U. S.* v. *Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *U. S.* v. *Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State* v. *Sprague*, 4 R. I. 257; *Ochs* v. *People*, 124 Ill. 399, 426, 16 N. E. 662; *Reg.* v. *Whitchurch*, 24 L. R. Q. B. 420; *U. S.* v. *Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg.* v. *Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg.* v. *Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S.* v. *Bayer* the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main, "Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy. In *Ochs* v. *People*, *supra*, it was

said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that section 4466a, Rev. St. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the Circuit Court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, *i. e.*, that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named—which satisfied the requisites of the statute to that extent—concert together with intent maliciously to injure the Journal Company and the other persons named, in their trade and business, sufficiently charged the doing of those acts made an offense by the statute. That such general language substantially follows section 4466a, and that such section is the only statute making a conspiracy without an overt act a criminal

offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecesary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense—not an unlawful conspiracy to injure, generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on a supposed insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination the evidence, for that purpose, was ample to give

the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that, turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates twenty-five per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate. Now it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement by reasonable inference, the independent purpose

to harm the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any reason that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper was so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an

intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the re-argument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person acting by himself or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations—so much that way that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that as regards combinations of individual independent interests, de-

signed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the Legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Gibbs* v. *McNeeley* (C. C.), 102 Fed. 594; *Nester* v. *Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247; *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *Jackson* v. *Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *People* v. *Nussbaum* (Sup.), 66 N. Y. Supp. 129; *Leonard* v. *Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *People* v. *Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Ford* v. *Association* 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus: "It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law, to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the Legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the

courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied. Cont. of Pers. & Prop., Sec. 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations to restrain, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens* v. *Reilly* (decided Jan. 8, 1901) 109 Wis. ——, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be re-written. The following are the cases referred to: *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. Div. 598, decided in House of Lords and reported in (1892) App. Cas. 25; and *Huttley* v. *Simmons*, (1898) 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first

decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fay, L. J., said: "I lay out of consideration this case of competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The Mogul S. S. Co. Case, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if prepetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combin ations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the Mogul S. S. Co.'s Case on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory* v. *Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that

such principle had prevailed in the English courts for two centuries prior to the Mogul S. S. Co. Case, we are supported by the lord chancellor in *Allen* v. *Flood*, [1898] App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the Mogul S. S. Co. Case, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory* v. *Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford* v. *Brandon*, 2 Camp. 358, a similar case; or *Garret* v. *Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen* v. *Flood*, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen* v. *Flood* was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the Mogul S. S. Co.'s Case, and said that, "If the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would

have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen* v. *Flood*, it was but a step to reach *Huttley* v. *Simmons*, *supra*. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the Mogul S. S. Co. Case and that of *Allen* v. *Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley* v. *Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic Print Works* v. *Ely & Walker Dry-Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley* v. *Simmons*: "If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. * * * But, notwithstanding the decision in *Huttley* v. *Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action.',

Section 503. In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley* v. *Simmons*, would be to overrule those cases. *Bratt* v. *Swift*, 99 Wis. 579, 75 N. W. 411; *Association* v. *Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127; *Gatzow* v. *Buening*, 106 Wis. 1, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 72, § 2; *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559; *Carew* v. *Rutherford*, 106 Mass. 14; *Ertz* v. *Exchange Co.* (Minn.), 81 N. W. 737; *State* v. *Buchanan*, 5 Har. & J. 317; *Com.* v. *Waterman*, 122 Mass. 57; *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.* (*C. C.*), 60 Fed. 803; *State* v. *Norton*, 23 N. J. Law, 33; *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890; *Sherry* v. *Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith* v. *People*, 25 Ill. 17; *In re Crump*, 84 Va. 927, 6 S. E. 620; *Doremus* v. *Hennessy*, 176 Ill. 608, 52 N. E. 924.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley* v. *Simmons*, appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the Mogul S. S. Co. case. So far as then developed they were presented in *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.*, *supra*, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com.* v. *Carlisle*, *Brightly*, *N. P.*, 36, the following: "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable

conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "*De minimis non curat lex*" applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.*, *supra*, the union of individual forces by agreement to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to

be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Brammel in *Reg.* v. *Druitt*, 10 Cox. Cr. Cas. 593, that it has often been quoted by courts and textwriters and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendants in error are severally reversed and the cause is remanded with directions to remand them to the sheriff of Milwaukee county.

DODGE, J., took no part.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

MELVIN A. HOYT,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the SUPREME COURT of the STATE OF WISCONSIN.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The good Athanasius, it is said, confessed that in his speculations on the Trinity "the more he thought the less he comprehended; and the more he wrote, the less capable was he of expressing his thoughts."

2 *Gibbon*, 488.

At some risk of demonstrating, without, however, formally confessing, a like incapacity to deal with the questions presented in this record, I have ventured to further tax the patience of the Court by a brief discussion of one aspect of the case which has not been fully treated, adding at the same time a few citations, etc., on propositions already discussed.

In this connection I am tempted to quote, as descriptive of the law of Criminal Conspiracy, Lord Camden's definition of Judicial discretion, which he declares to be "the law of tyrants. It is always unknown; it is different before different Judges; it is casual and depends upon constitution, temper and passion."

I have already indicated what seems to me to be the true course which the Courts should pursue in order to rescue the law from this condition. But that it is in such a state of confusion is not so much, as many critics seem to suppose, the fault of Courts, Judges and lawyers, as it is a result of the inherent difficulties of the subject.

Fully conscious of those difficulties and of the imperfect manner in which the brief already submitted deals with them, I still hope in a measure to escape the imputation of further darkening "counsel by words without knowledge," by leaving the general subject of criminal conspiracy where it is left in that brief; and now to discuss the question how far the decisions upon anti-trust legislation, so much debated in the courts, and the fact that in Wisconsin such legislation exists, bear upon this case.

I.

Undoubtedly in discussing the effect of the Fourteenth Amendment upon the power of police possessed by the several states, it is admissible and to some extent necessary to examine decisions made as to the consistency of such Statutes with the provisions of that amendment.

But to say, speaking generally, that such Statutes may be adopted by the states, as well since, as before its adoption, is not to determine this case. Nor do we approach much nearer its correct decision by conceding that section 1747e of the Statutes of Wisconsin of 1898, cited by the learned Attorney General is not inconsistent with that amendment.

Before proceeding on this line I must however refer to what appears to be a radical divergence of view between the learned Attorney General and myself as to the relation of this amendment to the police power of the state.

At Page 12 of his brief he quotes Mr. Justice Field to establish the proposition that neither the Fourteenth nor any other amend-

ment to the Federal Constitution was intended to interfere with the police power of the state.

It may be that at one time the decisions of this Court seemed to lend some color to this view.

An intelligent commentator on our jurisprudence observed some years since: "Under the definition given of the police power, that it is the authority residing in every sovereignty to pass laws for the internal regulation and government of the state necessary for the public welfare and the judicial concession that this power is not impaired by the Fourteenth Amendment, there is grave danger that that amendment will become irretrievably lost within the illimitable or indescribable boundaries of the police power."

State vs. Goodwill, 25 Am. St., 863-883 in notes.

But I should suppose that, under the rule laid down in the recent case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540 (cited pp. 76-7 brief) where the case of *Barbier vs. Connolly*, from which the Attorney General quotes, was cited in support of the judgment of this Court in the later case, the question raised is hardly open to debate. Indeed it is possible that no such contention on the part of the State is intended; and in any event it would appear to be quite baseless.

Recurring now to the subject in view, there is no doubt that many so-called anti-trust statutes have been sustained by the Courts of last resort in various states. But the statute in question is not, nor does it purport to be, such legislation.

The plaintiff in error is not charged with any infraction of such a statute; he is not accused of a conspiracy to restrain or monopolize trade but with conspiring wilfully and maliciously to injure etc., by the methods stated in the information. The gist of the charge is this particular conspiracy or criminal concert. It would be impossible to sustain a conviction if this were wanting, even though the specifications might be sufficient to show some other purpose unlawful under the anti-trust Acts; for no such purpose is charged. Had there been a general charge of conspir-

acy wilfully and maliciously to injure, etc., in the language of the statute, without particulars and had plaintiff in error without calling for particulars demurred, the information might have been sufficient under this statute.

But it clearly would have been insufficient under the anti-trust act referred to by the learned Attorney General. (P. 12 Brief.)

The mere addition of particulars indicating the means adopted in execution of the conspiracy charged, could not make it good under the latter statute nor is there any such view expressed by the Court below.

There is no charge that the accused "combined or conspired with any other person to monopolize or attempt to monopolize any part of the trade or commerce" of the state.

That is the gist of the offense prohibited by that statute. Whether valid or not, though I perceive no reason why it is not, that question is entirely foreign to this case. For reasons already indicated, I am clearly of opinion that the particulars stated do not show such conduct as is within the prohibitions of that act. But in the absence of a definite charge of such a conspiracy and in the face of a clear and unambiguous charge of a conspiracy to do something else, prohibited by another statute, I am quite at a loss to understand why the learned Court below and the learned Attorney General engage themselves so much with anti-trust statutes, except possibly on account of the dearth of other more relevant matter to support the judgment complained of.

In this case it must not only appear that the things done by the accused may, consistently with consitutional limitations, be prohibited and that such prohibition has been imposed; but it must also appear that the accused is charged with the offense thus created.

As he is not charged with any offense against the anti-trust statutes of Wisconsin, their provisions are immaterial. That such statutes there and elsewhere are generally sustained as a legitimate exercise of legislative power by no means demonstrates the admis-

sibility of a statute like that in question, having apparently an entirely different scope and object and bearing also such a sweeping and proscriptive character. The real question indeed in this case is not even whether the legislature may properly penalize such conduct as that of which the accused stands convicted. But whether it can denounce the penalties of the law not only against such conduct but against everything else that falls within the inhibitions of the act in question. *Colon vs. Lisk*, 153 N. Y. 188 *infra*.

It is quite unnecessary therefore in this aspect for us to concern ourselves with anti-trust laws or the possible effect which a decision adverse to the state in this case might have upon the power of legislation in this attractive and inviting field. Indeed nothing ought to be done, except with the greatest caution, to disturb the general confidence in the popular panacea of a law against the trusts, as a universal cure-all for the ills of modern commercial and economic life. The victims of such distresses are apparently just now so enamored of this popular remedy that in clamoring for its application and enforcement and, indeed, in the mere knowledge of its existence, they derive such great satisfaction as largely to forget their sufferings.

Certain great doctors of the body politic too, having discarded all previous nostrums advocated by other practitioners, not to mention several of their own, now range up and down the land, after the manner of a modern Paracelsus, decrying in a loud voice all other methods and schools of healing and proclaiming this the only way to economic and social health.

Whether, as the court below indicates, the man of learning who challenges such power of legislation must be a man of courage or not, it is quite clear that he who questions its efficacy must be one of no little hardihood. It is most fortunate, therefore, that no such exacting requirements are demanded in the adequate discussion of this case.

I by no means concede that the accused could be properly convicted under the anti-trust statutes of Wisconsin.

The combination or conspiracy charged imposes no restraint on trade. Advertising doubtless promotes and fosters trade but it is not trade.

I am familiar with no decision holding that an agreement or combination of newspapers in relation to the prices of advertising is a contract in restraint of trade. Certainly I do not imagine that the learned Attorney General will assert that unions of laboring men and mechanics to increase wages are criminal conspiracies under such acts.

The decision of Mr. Justice Harlan in the case of the Northern Pacific strike is a distinct negative on such a theory and this accords with all the cases. Yet such combinations have a much more intimate connection with and direct effect upon trade and commerce than that charged in this case. But whether this view be or be not sound is immaterial; for such statutes have nothing to do with this case, nor indeed do I understand the court below to expressly hold the contrary but rather to reason, by a kind of vague analogy, that because such statutes are upheld, the statute in question may be.

If they do not apply, then the only statute in question is that already quoted and so much discussed. Indeed such seems to be the holding of the court.

I recur therefore to the proposition that it is not enough to say that the state might have adopted a statute prohibiting and punishing conduct such as this information, in its particulars and specifications, charges against the accused.

As Counsel for plaintiffs in 34 & 35 well say the constitutionality of a penal statute must be tested not only by what has been attempted under it, but by what must be declared criminal in accordance with its plain prescription.

This is a well settled canon of constitutional law.

In *Colon vs. Lisk* already cited, (153 N. Y. 188, 60 Am. St., 609) a statute providing that every vessel by aid of which one person should interfere with the oysters of another planted in the

waters of the state, or remove stakes, buoys or any boundary marks of any planted beds, might be seized within one year thereafter and being condemned before a Justice of the Peace should be sold and the proceeds appropriated by the state, was held unconstitutional. The Court among other things said:

"In discussing the constitutionality of this act, it is to be remembered that the question is to be determined, not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority (citing cases.) When considered with that idea in view, it at once becomes obvious that this statute may be employed to confiscate to the state the entire property of an individual for the commission of a trespass upon the property of another, however slight, and this, too, although the owner is guiltless of any intended or actual wrong."

Suppose that the Legislature of Wisconsin had seen fit to declare that the offense *Majestas laesa* should thereafter exist in that state, and that whoever spoke or wrote disrespectfully of the Governor or any other state officer or conspired with one or more to induce others so to do should be deemed guilty of that offence and on conviction punished accordingly. Persons being charged under this statute with having conspired to induce the publisher of a newspaper to commit this specific offense, the specifications in the information showing that the particular language of which the conspirators sought to secure publication involved a grossly libelous charge of embezzlement against the Treasurer of the State, would the hypothetical statute, when examined as to its constitutionality, be in any wise aided because under other constitutional statutes the conspirators might have been prosecuted for conspiring to publish a false and malicious libel? Or because there being no such statute, it was within legislative competence to enact one? Discussion of this subject is superfluous; for no where is the rule better settled than in this court.

Baldwin vs. Franks, 120 U. S., 678.

In that case previous decisions on the same point are collected.

I have no hesitation therefore in affirming that whatever may be the power of a state in respect of legislation against trusts and combinations to engross or restrain trade, this statute can not rest on that power because it is not addressed to these subjects; and that it is wholly inadmissible to attempt either to limit its general terms or to distort its language so as to make it applicable only to such conspiracies.

It is perfectly obvious from the existence of other statutes, to which the Attorney General directs attention, that there was no necessity for this statute to reach such conspiracies against trade and commerce.

Therefore there is no warrant whatever for any suggestion that a decision against the state in this case would limit the power of a state to legislate against such unlawful combinations. But if it would, then it ought to be so limited; for constitutional rights must be maintained at whatever cost.

II.

I now call attention to a few other cases where the Fourteenth Amendment has been successfully invoked against state legislation.

A statute forbidding an employer to discharge an employe because a member of a labor organization, is not permitted under this amendment.

State Ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530.

A law prohibiting Railway ticket selling except by agents authorized by Railway Companies is unconstitutional.

People vs. Warden of Prison, 157 N. Y. 116. S. C. 68 Am. St., 763.

So is a law prohibiting giving trading stamps.

State vs. Dalton, 22 R. I., 77-86-88-9, S. C. 84 Am. St., 818.

The opinion in this case contains an extensive collection of authorities. At Page 86 the court said, referring to the constitutional right to liberty:

"This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always of course, that the business and the mode of carrying it on are not injurious to the public, and provided also, that it is not a business which is affected with a public use or interest."

After alluding to the great injury which the mammoth department stores inflict on small shopkeepers and citing *Chicago vs. Netcher*, 183 Ill., 104, as holding that such can not be prohibited by law, the Court says:

"It may be demoralizing to legitimate business for two great dry goods houses to cut prices in the attempt to undersell each other, or for two competing railway lines to sell tickets at half price in the attempt of each to get an advantage over the other; yet probably no one would claim that such competition could be prohibited by law. ..... The great law of competition invites and promotes this sort of demoralization and the remedy for one who is injured by it lies not in legislation but in being able to keep pace with the changed, if not always improved, methods." P. 89.

A statute of New York requiring contractors with a city for public works to pay their laborers and workmen not less than the prevailing rate of wages is unconstitutional.

Paternal legislation of this general character is condemned in the opinion.

People vs. Coler, 166 N. Y., 1. S. C., 82 Am. St., 605.

In the opinion in that case a large number of cases are cited holding similar views. Among others,

People vs. Hawkins, 157 N. Y., 168 Am. St., 736.

In this case it was said, the act in question requiring prison made goods to be stamped before sale so as to show where made, etc.

"The statute in question is aimed at property produced by a certain kind of labor, and the plain purpose is to depress its value or restrict its sale in order to enhance the price or enlarge the demand for the same kind of property produced by some other

kind of labor. It belongs to a class of laws which have become quite common in recent years, all resting largely upon the notion that the important problems involved in the social or industrial life of the people may be solved by legislation. This theory has, no doubt, a certain fascination over some minds, but so long as legislative power is circumscribed by the restriction of a written constitution, a statute like this can not be sustained by the courts."

An act providing for the weekly payment of wages was held to be unconstitutional as depriving persons thereby affected of property or liberty without due process of law.

Republic Iron & Steel Co. vs. State, (Ind), 66 N. E. Rep., 1005.

In a very recent case the Supreme Court of Illinois has held a statute providing for free employment agencies which prohibited furnishing employes or information to any one whose employes were on strike or locked out contrary to this amendment.

Mathews vs. People, 202 Ill., 389-401.

It is true the court is guilty of a slight inadvertence in supposing that the fifth amendment applies; but the conclusion that the fourteenth condemns the act in question is distinctly announced and on this ground the whole act was condemned.

As in the former brief I digressed from the argument to say a word on the subject of boycotting, I venture to print something on that topic which has since come under my observation.

The language quoted is that of a very distinguished lawyer who afterwards held high Judicial position. That he employed it as an advocate and not as a Judge, possibly detracts from it the somewhat adventitious weight accorded to Judicial utterances. But his observations are so practical and sensible, that I am satisfied their inherent and intrinsic merit entitles them to consideration.

"My Lords, in this matter of boycotting, may I be forgiven for using the celebrated exclamation of Dr. Johnson, and say: "Let

us clear our minds of cant."* Boycotting has existed from the earliest times that human society existed. Up to a certain point, boycotting is not only not criminal, but I say is justifiable and is right. For what does boycotting mean? It means the focusing of the opinion of the community in condemnation of the conduct of an individual of that community who offends the general sense of propriety, or offends against its general interests. Is there no boycotting at the bar? Is there no boycotting in the other professions? Is there no boycotting in the church? Is there no boycotting in politics? Is there no boycotting of tradesmen in Election times? What is the meaning of "sending a man to Coventry?" I say that boycotting,—I am not justifying intimidation; I am not justifying force; I am not justifying violence in connection with it; those are different things. I am talking of an act of moral reprehension called boycotting, and I say it always has existed and always will exist." *Sir Charles Russell*, before Parnell Com. 215.

The same views are taken and blacklisting is held lawful in *Boyer vs. Western Union Tel. Co.*, 124 Fed. Rep. 246—Rogers D. J.

Counsel in 34 and 35 have called attention to a very able paper by Mr. L. C. Krauthoff, now of the Chicago Bar, which he read before the American Bar Association in 1898 on "Malice as an ingredient of a civil cause of action." 21 Am. Bar. Rep., 335.

All of the cases then reported on this subject are subjected by the learned author, to a careful and discriminating scrutiny. His paper is a valuable and important contribution to the literature of the law on this general topic.

III.

The learned Attorney General concludes his brief after referring to sundry statutes in force in various states with these observations.

"It will be seen that these various statutes while differing

* What the critical old Doctor really said to Boswell, was, "My dear friend, clear your *mind* of cant." This is much more Johnsonian than any phrase reflecting at all on his own mental attitude.

somewhat in their terms and scope, are all directed to the same end, to-wit: the encouragement of industry, by the *prevention of malicious* interference therewith, and the prohibition of combinations organized and intended for the purpose of hampering, hindering or destroying individual enterprise in legitimate trade and commerce. The fact that such statutes so generally prevail in the various states is strong evidence, not only of the necessity for such restraints, but of the general policy of legislation on the subject and the understanding of the courts that such statutes are not without the legislative power."

The cases which I have cited illustrate how the courts regard some of the statutes thus referred to. Statutes like that of Indiana as to discrimination by employers between Union and Non-union labor and like that of Minnesota as to blacklisting have been in effect condemned by the courts as beyond legislative power (v pp. 89-84 brief and cases cited above.)

But, irrespective of this, it must be noted that counsel declares the purpose of such statutes to be to prevent *malicious* interference etc. Here, however, we have a statute denouncing its penalties against wilful interference whether malicious or not. The information charges a combination or conspiracy *wilfully and maliciously* to injure the Journal Company. (Manscript 10.) But the statute penalizes such conduct if either wilful or malicious. The question raised must be decided not on the form of the accusation but on the language of the statute; and this is not restricted to malicious interference as counsel, wholly without warrant, assumes.

I call attention to the following *Errata* in brief. P. 93, line 15; read "permissible" not "presumable." P. 109, line 9; read "combine wilfully or maliciously to injure;" not "wilfully or maliciously combine to injure."

There are several errors, typographical or otherwise, in the opinion as printed, like that in Baron Bramwell's name (p. 162).

But as they exist in the opinion as printed officially, I have not attempted to correct them.

Respectfully submitted,

S. S. GREGORY,
CONRAD H. POPPENHUSEN,
JOSEPH L. McNAB.

Counsel for Plaintiff in Error.

PLAINTIFF'S BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

MELVIN A. HOYT,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR ON RE-ARGUMENT.

It is not my purpose to here restate those arguments which, possibly with too much fullness, I have heretofore elaborated in print against the judgment pronounced in this case by the Supreme Court of Wisconsin. Without abandoning or modifying the positions which have been thus taken, I desire to offer some further considerations, perhaps from a narrower point of view, but which I believe to be conclusive against that judgment.

The opinion of the Supreme Court of Wisconsin has, no doubt, its merits; but lucidity is not one of them. It is impossible to tell exactly what the court intended by some of the language there employed.

To say that malice is to be inferred from the performance

of an unlawful act, and that certain conduct is unlawful because of malice thus presumed, is not only not convincing; it is the plainest sort of fallacy. I can not believe, therefore, that the learned court below intended to say that conduct, otherwise lawful, warrants an inference of malice; and that the fact of malice thus established affects such conduct with illegality—and hence the inference of malice follows. On the contrary, notwithstanding some language in the opinion which seems so to declare, what is really intended, I imagine, is that a purpose or desire to injure, *i. e.*, actual malevolence, infects the act otherwise innocent and brings it within the statute. I feel warranted also in the statement that the opinion, as a whole, holds that where such evil purpose either in whole or in part inspires the conduct of those charged under the statute, then their conduct comes within its penalties, although another motive, namely, a desire to benefit the alleged conspirators in the way of trade, as against a competitor, also to some extent induced the conduct claimed to be unlawful. Thus construed I maintain that the statute in question is clearly unconstitutional under the fourteenth amendment. And as this precise point, though argued orally, is not, perhaps, clearly developed in my former briefs, I deem it not improper to discuss it now.

I must at this point briefly restate the facts.

The publishers of four daily newspapers in the city of Milwaukee became engaged in a controversy, apparently over the question of circulation. The Journal announced that its circulation had so far increased that it was justified in increasing and proposed to increase its advertising rates twenty-five per cent;

thereupon the publishers of three other daily papers, the Sentinel, a morning paper, and the Wisconsin and News, evening papers, entered into an agreement that if any one advertised in the Journal at these rates, they would not receive his advertisement in any of their papers, unless he paid them a similar increase in their rates and advertised in all three. Obviously the effect of this was to discourage advertising in the Journal, and to promote the advertising patronage of the three papers whose publishers were parties to this arrangement. I shall not dwell upon this as it has been dealt with at some length by learned counsel for plaintiffs in error in the cases submitted with this case, and because I think the conclusion is so obvious as not to admit of serious dispute.

There was a statute of Wisconsin, 4466a, R. S. 1898, which is as follows:

"BOYCOTTING, STRIKES AND LOCKOUTS.

"Injury to Business; Restraint of Will.—Section 4466a. "Any two or more persons who shall combine, associate, agree, "mutually undertake or concert together for the purpose of "wilfully or maliciously injuring another in his reputation, "trade, business or profession by any means whatsoever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

Under that statute the proprietors of the Journal caused criminal informations to be filed against the publishers of each of the three newspapers named, including Mr. Hoyt, who was the publisher of the News, and on behalf of whom this argument is filed. This information is fully stated at page 7 of my former

brief. It charges the plaintiff in error with conspiring with Mr. Aikens of the Wisconsin, and Mr. Huegin of the Sentinel, wilfully and maliciously to injure the Journal Company in its business by agreeing that, if any merchant or other person, or corporation, should pay or agree to pay to the Journal Company its increased rate for advertising, in such case the person or corporation so advertising in the Journal, should not be permitted to advertise in either of the three other papers, except upon the terms indicated; that the plaintiff in error notified the advertising patrons of the Journal of this agreement, and that many of them were thereby induced to withdraw their advertisements therefrom, greatly to the injury of the trade and business of the Journal Company, and that the plaintiff in error with his other co-conspirators refused to allow the advertisements of divers persons to be inserted in either of said three papers because they had paid or agreed to pay the Journal Company the increased rate, and that, by reason of this combination, many merchants in Milwaukee and elsewhere, were prevented from advertising in the Journal.

The gist of the charge is a conspiracy unlawfully, and with the intent wilfully and maliciously, to injure the Journal Company in its trade and business. (Transcript 10.)

The opinion of the court below on a habeas corpus proceeding when the plaintiff in error was arrested on a warrant issued by an examining magistrate on a complaint substantially identical with the information, contains the only discussion of this case bestowed by the Supreme Court of Wisconsin upon it.

On final hearing on demurrer to the information the judgment of the Municipal Court of Milwaukee County was against

plaintiff in error and was affirmed on a short opinion in the Supreme Court, which simply referred to the opinion of the court in the habeas corpus proceeding for the grounds of the decision. (Transcript 19.) That opinion is printed as an appendix to my former brief, and is also printed in the appendix to the brief of counsel for Messrs. Huegin and Aikens on re-argument.

On December 7, 1900, a re-argument was ordered in the court below of the following question only: "Does the word 'injuring,' in Sec. 4466a, Stats. 1898, mean anything more than inflicting an injury for which a civil action for damages can be maintained, and if so, is the law constitutional?"

The State ex rel. Durner v. *Huegin*, 110 Wis. 189.

I wish, however, before proceeding to the point to which this argument is mainly directed, to refer to another view which seems to be relied on to some extent by the state. That is, that the contract or conspiracy charged is such as the state might lawfully interdict as in restraint of trade; and hence is one which the accused had no constitutional right to make under the guaranty of liberty in the fourteenth amendment. I have argued this in my supplemental brief, and purpose now merely to restate my position.

That is, first, that the accused are not charged with any such offense.

The charge is of conspiracy wilfully and maliciously to injure the Journal Company in its business; not of conspiracy to restrain trade. The particulars contained in the information, as held by the Wisconsin Court, may be properly referred to for the purpose of limiting and defining the nature of the conspiracy charged. But that conspiracy as charged, being the gist of the

offense, the particulars can not be allowed to alter its character and take the place of a definite charge of another and different offense.

Again, the Wisconsin Court seems expressly to hold that without the statute in question the conviction could not be upheld in view of the state of the law in Wisconsin.

But independently of this, a charge and conviction of a particular offense under one statute can not be upheld on the ground that, under the particulars stated in the information, the accused might have been proceeded against under another statute and upon a charge of a different offense. This would deprive a defendant of his right to know the nature and cause of the accusation against him and would not be due process.

This must also be true. Suppose this court, contrary to the views urged for the accused, should be of opinion that the combination shown in the particulars, was in restraint of trade and subject to lawful prohibition by the state. This court would then also hold that the accused had no right, secured by the Federal Constitution, to enter into such a combination. But having thus affirmed the right of the state to interdict such conduct, thus denying the constitutional right of the accused to pursue it, the next question would be, does the statute by which the state has attempted to exercise its rightful power, transcend the constitutional limitations imposed by the fourteenth amendment?

This question must be determined, not by what has been done or attempted under the statute in a particular instance, but by what may be done by virtue of its authority.

If it be conceded *arguendo* that the conduct of the accused as charged, is such that it comes within a statute directed against

combinations in restraint of trade, and the constitutionality of such a statute be also conceded, these concessions do not aid the state. For it is not at all a necessary element of the offense created by this statute, that the conspiracy denounced be in restraint of trade. It is within the compendious statutory interdict, if its aim be wilfully or maliciously to injure another in his business "by any means whatsoever." And the court holds that to inflict loss is to injure.

Therefore persons charged under this act may be convicted who are not charged with conspiracies in restraint of trade. Hence, obviously it can not be restricted to such conspiracies.

If this statute, as construed by the court below, includes within its prohibitions, combinations which are essentially rightful and constitutional, it can not be sustained as to such a combination as is wrongful and might have been constitutionally forbidden by this statute, had its prohibitions been limited only to such or similar combinations. This is not an instance where it is possible to say a statute is valid in part and void in part.

Baldwin v. *Franks*, 120 U. S. 678.

Indeed it is strange, as, on the theory of counsel, such ample remedy under the anti-trust statutes of that state exists to reach and punish these offenders, that, in view of the fact that such statutes seem to be unassailable on constitutional grounds, these proceedings were not brought under their comprehensive provisions.

It must be assumed, as the language of this act plainly indicates, that in its adoption the legislature aimed at offenses other than contracts or combinations in restraint of trade, which certainly are not expressly mentioned in this statute, and

are fully dealt with in other statutes; as, therefore, the legislature, and in this proceeding the prosecuting officers of the state and the court of last resort, seem to have ignored the anti-trust statutes as affording any basis for such a charge, such statutes may well be dropped from the discussion here; and, I will not, in view of these considerations, further argue their relevancy, nor the proposition that the question whether they are or are not consistent with the fourteenth amendment, is not the question presented in this case.

Whatever the power of the state over the subject-matter of legislation, the Federal Constitution secures immunity, not merely in respect of rights which are referable to its provisions, but also from prosecutions under state statutes, enacted in defiance of its limitations.

The statute in question as construed by the Supreme Court of Wisconsin, when examined, not merely to see what has been attempted under it in this case, but to determine what may be done under its authority, is, for reasons already urged, in conflict with the fourteenth amendment; and as the same court has held its validity essential to this conviction, it is peculiarly and especially true in this case that if thus invalid, there is no law to sustain the conviction and it must be reversed.

To proceed now to the main point to which this argument is addressed, I assume that counsel for the state will not deny that, in the view held by the Wisconsin court, it is not the conduct of the accused but the motives that prompted it which bring it within the statute. It would indeed be idle to controvert this proposition. For the entire opinion on the merits, is devoted to an attempt to demonstrate that this statute is aimed at combina-

tions entered into, not to promote the business or to advance the pecuniary interests of those entering into such combinations, but planned to injure another in his trade or business.

And I understand that court to be, therefore, of the opinion that unless such purpose or intent, call it malice or what you will, appears, the offense denounced by the statute has not been committed. Though I by no means agree, it is not necessary to the immediate purpose of this discussion to quarrel with this view.

Having announced this, the learned court proceeds one step further and holds that it is not necessary that such evil purpose should be the sole motive impelling to the combination; but that if it exists, in whole or in part, or co-exists with a purpose to advance the interests of those in the combination by means not otherwise unlawful, then the offense contemplated by the statute has been committed.

This is a construction of the statute of a state by its court of last resort; and the question now to be discussed is whether this statute, so construed, is consistent with the fourteenth amendment.

I undertake to say that it is not; that this is substantially if not literally the same question that was presented in the Northern Pacific strike case where the Federal Circuit Court in Wisconsin announced the same view as that of the court below, and where the Circuit Court of Appeals for that Circuit through Mr. Justice Harlan, reversed the Circuit Court on precisely this point.

This view acquires added force from the fact that the Wisconsin court, in the opinion below, quotes with approval from the

opinion at the Circuit in that case, on the point as to which the Court of Appeals differed with the Circuit Court.

That case is reported at the Circuit as *Farmers' Loan & Trust Company* v. *Northern Pacific Railway Company*, 60 F. R. 803. Judge Jenkins, a very accomplished judge, gave the matter careful consideration, and wrote an opinion of great length, which in point of lucidity, sound reasoning and attractive literary style, must be regarded as the ablest presentation in the reports of the views held by the court below. He went on at great length to discuss the irreparable injury that the railroad system in question would suffer through the sudden cessation of work of its 12,000 employes; and while recognizing the general proposition that men might work for whom they would and quit when they saw fit, he found in the law some limitations on this right; and after a variety of graphic and striking illustrations where he held that it did not exist, and a further reference to the paralysis in the operation of this great system which would follow upon the exercise of the right claimed by the men, he said (page 813):

"All these hardships and inconveniences, it is said, must be submitted to, that certain of these men, discontented with the conditions of their service, *may combine and conspire, with the object and intent of crippling the property, to suddenly cease the performance of their duties.* It is said that to restrain them from so doing is abridgment of liberty and infringement of constitutional right. I do not so apprehend the law. I freely concede the right of the individual to abandon service at a proper time and in a decent manner. I concede the right of all the employes of this road acting in concert to abandon their service at a proper time and in a decent manner; but I do not concede their right to abandon such service suddenly and without reasonable notice."

Referring to the injunction then in force, a motion to modify

which, on the point indicated, was then under consideration, he remarked (page 814–815):

"The restraint imposed was with reference to combining and conspiring to abandon service with the object and intent of crippling the property. Its office was to restrain the carrying into effect of the conspiracy."

He then inquires if such a conspiracy was unlawful, and quotes the language of Chief Justice Gibson, which is quoted in the opinion of the court below. He then proceeds to cite the section of the Wisconsin Statutes here in question, and after an extended and very elaborate discussion, to refuse the motion to modify the injunction, which prohibited employes on this railway either from combining or conspiring to quit or actually quitting the service of its receivers with intent to cripple the property, or so as to cripple the property, and prevent and hinder its operation.

In the Court of Appeals the case is reported as *Arthur* v. *Oakes*, 63 F. R. 310, and the opinion was written in that case by Mr. Justice Harlan. In that court apparently the case also received great consideration. It was there held that an injunction would not lie to prevent men from quitting the service of a railway company whatever other remedies might exist in the law. The injunction against combining with the object and intent, as the court said (page 320), not simply of quitting the service of the receiver because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad, was sustained because it was said the persons sought to be restrained admitted that unless the restraining power of the court was exerted, the dissatisfied employes and others co-operat-

ing with them would physically disable and render unfit for use the cars and other property in the possession of the receiver, and by force, threats and intimidation prevent the receivers from operating the road; and the court said that the general inhibition against combinations and conspiracies with the object and intent of crippling the property, must be construed as referring only to acts of violence, intimidation and wrong, and it was distinctly said that these words in the injunction were not to be interpreted as embracing the case of employes who, being dissatisfied with the proposed reduction of their wages, withdrew on that account singly or by concerted action without undue interference with others. The court then proceeded to employ the language which I have already quoted in my main brief, but which for convenience I repeat here:

"These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the *firm belief and expectation* that a simultaneous quitting without notice *would temporarily inconvenience the receivers and the public.* If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they can not be legally charged *with any loss* to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to em-

ployes exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among the employes, and their withdrawal from service. * * *

What we have said about illegal combinations has no reference to such associations, but only to combinations *formed with the intent to employ force, intimidation, threats or other wrongful methods*, whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

I regard the phrase in this extract referring to the withdrawal of the men from service and stating that it would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public, as precisely equivalent to saying that it would not have been illegal, although the men took that course in the firm belief and expectation that their conduct would injure the business of the receivers engaged in operating the road. Holding such belief and expectation, it is most apparent that under the doctrines of the criminal law, they must be regarded as intending this definite consequence; and it is a matter not of law, but of common sense, that it is precisely this injury or inconvenience upon which men in organizing a strike rely to compel their employers to come to terms with them. I feel warranted, therefore, in saying that the decision of the Federal Court at the Circuit in this case, relied upon by the Supreme Court of Wisconsin on this precise point, has been overruled, and that the decision of the Circuit Court of Appeals in the same case is an authority against the opinion of the court below.

But it seems to me that the position of that court in this regard is clearly untenable. Counsel for plaintiffs in error in the two other related cases has amply demonstrated that a right, the exercise of which is regarded as criminal or not, as a jury may find with reference to the motive of its exercise, is of a most precarious and uncertain character and in effect no right at all. It is still more obvious that a metaphysical inquiry such as that suggested by the Wisconsin court as to the nature of the mixed motive which may influence men acting for the purpose of promoting their own interests and yet intending injury to their competitors, would be most fruitless and impossible. In every such case arising in the course of trade competition, it is too obvious for argument that if the motive of the alleged conspirators be to gain trade at the expense of their competitors, they must in every case contemplate, and, therefore, in the law must be deemed to intend, not only to increase their own business, but by taking away business from others, to injure the business of their competitors.

Now as I understand the rule in the class of cases upon which the Wisconsin court relies, so far as any entitled to serious consideration by this court are concerned, such a purpose to injure is never held to affect the legality of a combination to promote the interests of those engaged in it. It is only where such malice or malevolence or evil intent, however named, is the sole motive for such a combination that it becomes an unlawful conspiracy; and this limitation upon the doctrine of the Wisconsin court has been recognized with respect to offenses created by statute in at least one case in Massachusetts, to which I referred on the argument, and of which I shall presently say something

further. On the authority of that case Mr. Rawle in his edition of Bouvier's Law Dictionary defines malice as "A malevolent motive for action without reference to any hope of a remoter benefit to one's self to be accomplished by the intended harm to another."

I do not understand that the learned court below in its opinion discriminates in this regard at all between the conduct of conspirators and of individuals, except in one particular. It is said in the opinion that one man through purely malicious motives may attract to himself another's customers and the injury be so slight in contemplation of law that the maxim *de minimis* applies. But still I understand the court to hold that that would be an injury in the eye of the law which, however, might not be redressed because of its insignificance. I should not, however, make this statement merely from this dictum, but rather from the discussion (pages 155 *et seq.*, my original brief, where the opinion of the court is printed). It was there said, among other things, by the court, discussing the Mogul Steamship Company case:

"The free course of trade that one or a number in combination may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade."

In discussing *Allen* v. *Flood*, it was said that there the element of conspiracy was absent but the element of malice was present and that the majority of the court there decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. It is true the Wisconsin court did then refer to the reasoning of the House of Lords as applied to conspiracy as being out of harmony with right and justice and prior decisions; but the learned court

criticised the decision in *Allen* v. *Flood* and cited with satisfaction the extravagant language of the Lord Chancellor and one or two other of the Law Lords in their criticism of the majority. All the English cases were, it is true, civil cases; but if I am not mistaken in the view of the learned court below, they were deemed none the less relevant to this discussion.

I venture the suggestion that if it is within legislative competence to declare that an act of one or of several, otherwise lawful, becomes criminal when done maliciously, that term means the same thing in both classes of statutes.

In *Barclay* v. *Abraham*, 64 Lawy. Rep. Ann. 255, the Supreme Court of Iowa decided a case which is digested as showing that a man might not, with the malicious purpose of depriving his neighbor of water, sink wells on his own land and waste water thus drawn, to his neighbor's injury. The case does not so hold, but denies the *right* of a land owner thus to waste water, not for beneficial use in connection with the land.

Quoting from a Minnesota case the court said:

"Except for the benefit and improvement of his own property, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them.

Briefly stated, a land owner must not collect and wantonly waste percolating waters, which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people."

Nothing is here said of malice—on the contrary the court in the same opinion observes:

"The *right* being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict."

Italics mine.

Strangely enough the Supreme Court of Wisconsin has held on similar facts directly the contrary of this case in Iowa, and to the suggestion that malice was material, observed:

"This court has recently and distinctly held that the exercise of a property right can not be affected or curtailed by a malicious motive."

Therefore, in that case the court held a statute of the state attempting to prohibit waste of water was unconstitutional.

Huber v. *Merkel*, 117 Wis. 355–363.

In that case, *Metzger* v. *Hochrein*, 107 Wis. 267, is cited, where Mr. Justice Marshall, who wrote the opinion in the court below in this case, had occasion to express his views on this subject.

He there said (p. 270):

"True, there are decisions in the State of Michigan, and some *dicta* of courts elsewhere, to the effect that, if one maliciously use his own property to the annoyance of his neighbors, regardless of any physical discomfort to them, he is guilty of an actionable nuisance; the element of malice rendering that an actionable wrong which would otherwise be rightful. That doctrine, however, has very little support. None, in fact, where the rules of the common law have not been changed by legislation and the courts have kept strictly within their legitimate sphere as administrators of the law. The general rule is that whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. 16 Am. & Eng. Ency. of Law, 930; *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505; *Mahan* v. *Brown*, 13 Wend. 261; *Phelps* v. *Nowlen*, 72 N. Y. 40; *Bordeaux* v. *Greene*, 22 Mont. 254; *Rideout*

v. *Knox*, 148 Mass. 368; *Guest* v. *Reynolds*, 68 Ill. 478. That doctrine is as well defined in the common law as any that has to do with the rights and remedies cognizable by courts, and courts that have departed from it, have as it seems, trespassed upon the domain of the legislative department of the government.

In *Rideout* v. *Knox*, *supra*, the power of the legislature even was questioned to curtail the use by a person of his own property to the extent of preventing its malicious use, the act under consideration being one to prevent the maintenance of unreasonably high fences from malicious motives. The court said, in effect, that the ownership of land carries with it the constitutional right to enjoy such land in any way the owner sees fit, limited only to such external effects as diminish the physical enjoyment of adjoining property; that such right, regardless of the motive for its exercise, is a property right within constitutional protection, the same as any other property right, and can not be interfered with except to the extent of reasonable police regulations; that legislation preventing the unreasonable maintenance of a high fence, where a bad motive is the sole purpose thereof, is within the limits of the constitutional exercise of police power. But it was intimated that legislation, prohibiting the maintenance of a fence where a bad motive for such maintenance *is coupled with some other that would cause it independent of the mere desire thereby to annoy an adjoining owner*, would contravene constitutional rights of property." (My italics.)

I perceive no distinction in this regard between the exercise of a right of property and the exercise of an essential personal right to liberty, both of which are equally secured against state action by the fourteenth amendment.

In *Rideout* v. *Knox*, 148 Mass. 368, S. C., 12 Am. State Rep. 560, Mr. Justice Holmes, after referring to the common law rights in respect of the enjoyment of lands and to the suggestion that, under the common law, the extent of a man's rights might depend upon the motive of their exercise, says:

"We do not so understand the common law; and we con-

cede further that to a large extent, the power to use one's property malevolently in any way which would be lawful for other ends, is an incident of property which can not be taken away even by legislation. It may be assumed that, under our constitution, the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner."

And again on the point in question, construing the statute, which in this regard was as follows:

"Any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

The learned justice said: "Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive, a motive without which the fence would not have been built or maintained. A man can not be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently."

The court below having instructed to the contrary in that case, its judgment was reversed.

I take it the construction of this statute would have been the same had it been aimed at combinations or conspiracies to build fences unnecessarily exceeding six feet in height maliciously, for

the purpose of annoying adjoining owners. And I assume further that had the legislature of Wisconsin adopted such a statute and had it been held by the Supreme Court of Wisconsin to be constitutional, if the motive for erecting such fences were in whole or in part malicious, this court would feel constrained to reverse a conviction obtained under that act on the ground that it was incompatible with the fourteenth amendment; that is to say, provided this court agrees with the views announced by the Supreme Court of Massachusetts in the case referred to.

It may be that an act by an individual, though malicious, may be regarded as lawful, where a combination by several to do the same thing, if malicious, would be regarded as criminal. This concession I make only for the purpose of this discussion; but unless the subject of malice is to be still further confused, if indeed such a thing is possible, the term as employed in reference to both instances must, in a statute, be given a similar interpretation.

I do not wish to take the time to repeat Mr. Krauthoff's amusing quotations from the English law on the subject of the meaning of the term malice; but the declaration of Sir James Fitz James Stephen, "that it seldom has any meaning except a misleading one," and of Mr. Bishop, our own text writer, "that its principal use is to convey away from the writer's mind ideas too misty for distinct utterance," are both worthy of the widest circulation.

It is impossible, however, in discussing American constitutional law, to ignore its sources and inspiration. It has its roots deeply imbedded in the jurisprudence of England, and in the common law of that jurisdiction not only as it existed when this

country was founded, but as it exists to-day; and my confidence in the propriety and integrity of this position is not lessened when I find upon turning to the English authorities that this principle appears to be there distinctly recognized and applied.

It is true that England has no written constitution in a sense. They have in that land institutions of government which are recognized and the jurisdiction and powers of which are as well defined as are those of our own land; but they have no written constitution, no actual Magna Charta of personal or property rights not subject to legislative modification, or indeed absolute and unimpeded sovereign control. But, as I conclude, with no opportunity, however, for personal observation, in no country are the great essential rights of life, liberty and property, more sedulously guarded than they are in England, and it is very seldom that the parliament attempts to deal with such rights in a way that ought to be regarded as contrary to constitutional limitations familiar here. Possibly the Factory Acts, so-called, may be an exception, as also the Irish Land Act.

In the Scotch case cited in my main brief the Lord Ordinary called attention to the fact that in the case before him, which was, I believe, a civil case, the pursuers' averments did not allege that the defenders acted wholly from malice; and he made the very shrewd and sensible observation that that was not a case of mere malicious purpose; "a case which indeed must occur seldom, if at all, in business transactions." It is equally true in this case that there is no allegation in the information that the accused acted solely from a malicious motive to injure the Journal Company.

But in the great case of *Quinn* v. *Leathem*, also cited in my

original brief, and which is, so far as I have been able to gather, the latest expression of the House of Lords upon the general questions discussed by the court below, and which I have no doubt that learned court would have hailed eagerly as sustaining its views with regard to *Allen* v. *Flood*, had it then been decided, the court took up this very phase of the question. I think this is especially material because the learned court below declared that the accused were guilty of an unlawful conspiracy at common law, and that it was only on account of the state of legislation in Wisconsin that resort to the section under consideration was necessary, and that this section is a mere declaration of the common law.

I have quoted somewhat from the opinions in *Quinn* v. *Leathem*, as strongly tending to sustain the position taken for plaintiff in error and as illustrating the distinction between conduct done directly in competition, and wanton conspiracy to injure those with whom the conspirators are not engaged in any competition. But not having the point now under discussion so clearly in mind, when I wrote that brief early in the spring of 1903, under the impression that this case was then about to be called for argument, I omitted to collate the expressions of Lord Shand on this subject. They are so accurate and so conclusive, as they were neither controverted nor modified in any way by what was said in any of the other opinions, that I quote them as follows:

Quinn v. *Leathem*, L. R., A. C. (1901), 495, opinion of Lord Shand:

"In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful,

although resulting in such injury to others as may be caused by legitimate competition in labor, yet that combination for no such object, but in pursuit *merely of a malicious purpose to injure another*, would be clearly unlawful; and having considered the arguments in this case my opinion has only been confirmed."

This was said referring to *Allen* v. *Flood*. The learned Law Lord then added these observations:

"This being clearly so, the question now raised is really whether in consequence of the decision of this house in the case of *Allen* v. *Flood* and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another and *not to advance the party's own trade interests*, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen* v. *Flood* has made boycotting lawful."

At another point he said:

"As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of *to promote his own trade interests* which it was held he was entitled to do, *although injurious to his competitors;* whereas in the present case, while it is clear there was combination, the purpose of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests."

In concluding he said:

"It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury, that is to say, they acted by conspiracy, *not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade.* I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff with the result of causing serious injury to him; and that the case of

Allen v. *Flood*, as a case of legitimate competition in the labor market, is essentially different and gives no ground for the defendants' argument."

(My italics.)

Lord Brampton in the course of his opinion observed:

"But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of, acts of wanton aggression, the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

"It can not be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labor or fair wages or to promote a good understanding between employers and employed, and workman and workman, or for the settlement of any dispute, for none had existence."

The court below does not find, nor if it did, would any such conclusion be warranted, nor is there any basis for it in the information, that the accused combined, in the language of Lord Shand, not for any purpose of advancing their own interests, but for the sole purpose of injuring the prosecutor in his trade; and Lord Brampton, as quoted, declines to spend time upon a consideration of what may be done in competition, which he declares is not even suggested as a justification of the acts complained of, acts of wanton aggression.

I take it that if a state may prohibit conspiracy to injure a trade competitor by causing him to lose trade, when such conspiracy or combination is not in furtherance of the pecuniary interest of those party to it, then a state may prohibit similar wanton and malicious conduct by an individual, particularly if, as declared by the Wisconsin court, the wrong inflicted by an

individual by such conduct differs only in degree from that following the combined action of several. I hold, however, under the cases cited and upon reason, that this power, if it exist, is limited to prohibition of such wanton and malicious conduct only, and that it does not extend to interdicting all attempt to injure where such occurs in the effort, either singly or in competition, to win trade from a competitor, although the parties engaged in such an effort know and intend that loss to their competitor follow, and even though the desire to inflict such loss be one of the motives that influence them to the course they pursue. Therefore a statute which attempts to accomplish this, is unconstitutional under the fourteenth amendment.

The question now under examination is not primarily whether the accused is guilty as charged, but whether the statute in question is constitutional, if it be construed as covering conduct not wholly malicious. On this point I contend that the right to liberty under the fourteenth amendment is not less than the right to property. And that the analogies of the law as to the limitations contained in that amendment on the power of the state in legislation affecting property rights, are applicable to this case and controlling.

On this ground, quite independently of all other considerations, the judgment below should be reversed.

But leaving this question, I wish to add in conclusion something suggested by a broader and larger view of this case.

I do not contend for the shibboleth that what one may do all may do. As before suggested, when one thousand men act simultaneously and in combination, it can with no propriety nor truth be said that they thus all do what one alone thus acting

would do. Each does what the other does. All together do something, the sum and total of which may be very different.

But this proposition I do contend for: that what an individual has a right to do he may do, and no court nor other agency of the law may justly call his motive in question.

And that in respect of what one thousand men may lawully do in combination, they, each and all, are entitled to the same immunity as to motive that an individual may claim in this regard. (p. 26, my brief.)

Mr. Wigmore, of the Northwestern University, has well said: "The distinction must rest, not upon the quality of the motive, but upon the nature of the outward act. There is no more persistent and yet no more unfounded notion, no notion more fitted to reverse legal relations and make chaos out of definite principles," than the contrary view.

If, for instance, men have a right to act in combination politically, is that right lost because exercised maliciously? Are Democrats, combining out of hatred for a Republican candidate to defeat him, conspirators because they work and vote for their own candidate, not because they like him, but because they dislike his opponent?

If I lose my temper in dealing with a tradesman and consequently discontinue my patronage, am I only protected from liability on the principle *de minimis non*, as suggested by the court below? If I induce others, on account of my grievance, to agree to withdraw their patronage, are we all conspirators and subject to criminal visitation and civil action? and are all innocent if I really had a grievance, and guilty if I had none? Those who

hold this view seem to think that nothing added to nothing makes something. It does not.

No man in trade has a legal right to the patronage of others. If they withhold it he has suffered no legal wrong. He has sustained no injury. For, as the Supreme Court of Rhode Island well said in a case already cited: "It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in a legal sense, means damage resulting from a violation of a legal right." *Macauley* v. *Tierney*, 19 R. I. 255. Where an individual refuses to trade with another he in no sense violates the latter's legal right. He simply exercises a right which is inalienable and constitutional in himself. When two or more join in the exercise of this right, they are not justly chargeable with breach of any duty imposed by law, as to him with whom they thus refuse to trade. Now if one may not ask others to join him in such a course, it must be because the trader in question has a right, in law, to this trade; or because he, the person soliciting this cooperation, owes to the trader the duty to abstain from such solicitation.

I am not familiar with any sound principle of law which either secures this right, or declares this duty. Indeed, to attempt to establish such doctrine seems to be an effort to restrict the natural influence and effect of a sort of public or general opinion, which would ordinarily tend to recognize and reward efficiency, courtesy and other similar qualities in a successful merchant, and visit with loss of trade those lacking these qualities or manifesting others calculated to provoke resentment and repel custom.

That sometimes this right may be exercised harshly and in a manner which involves hardship and apparent injustice does not establish that it does not exist.

This is a field which the law does well not to invade. Any attempt in this direction will cause more wrongs than it will remedy.

Such combination to deprive a man of trade, to which he has no absolute legal right, may be conduct which in a popular sense affects him injuriously; but it can not be regarded as a "direct invasion of those rights which are guaranteed by law and which the law must, therefore, recognize and protect."

The parties engaged in such co-operation exercise their own rights; whether they act maliciously or from motives of self-interest, or from pure benevolence, as in the case of temperance societies, which labor to restrict and injure the business of liquor sellers, is wholly immaterial. It is the conduct or outward act itself, and not the motive, which determines its illegality.

These are my views; and I venture to express them, though not unmindful of the fact that this case does not, perhaps, call for a decision on this point. Obviously those here accused acted from self-interest at least to some extent. And as the court below holds the statute in question applicable to such conduct, it is clearly unconstitutional upon any sound construction of the authorities, including those on which that court seems to rely.

Respectfully submitted,

CONRAD H. POPPENHUSEN,

JOSEPH L. MCNAB,

Attorneys for Plaintiff in Error.

S. S. GREGORY,

Of Counsel.

FILE COPY.

Office Supreme Court U.S.
FILED
OCT 19 1903
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 297. 305.

MELVIN A. HOYT,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Nos. 299.

MELVIN A. HOYT,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

May it Please the Court:

The statute, the validity of which is called in question on these writs of error, is Sec. 4466a Wisconsin Statutes, 1898, as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur- "pose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or "for the purpose of maliciously compelling another to do or "perform any act against his will, or preventing or hindering "another from doing or performing any lawful act, shall be "punished by imprisonment in the county jail not more than "one year or by fine not exceeding five hundred dollars."

I.

This statute was construed by the Supreme Court of the state on habeas corpus proceedings based on the alleged insufficiency of the preliminary compliant on which plaintiffs in error were arrested.

State ex rel. Durner vs. Huegin et al., 110 Wis. 189. (Rec. 6).

The complaint there in question, it will be seen, was framed under the statute and charged plaintiffs with the offense by the statute denounced, setting forth specifically the combination, agreement and acts in pursuance thereof which it was alleged constituted the offense. The Court was called upon expressly to determine and construe the scope and meaning of the statute to determine whether the specific combination and acts charged in the complaint came within its purview, and in the course of the determination of that question the general scope and meaning of the statute with reference to the character of combinations against which it was directed were definitely determined.

The conclusion of the court thus announced as to the meaning and construction of the statute in this regard was as follows:

"Our conclusion is this: The term 'malicious injury' as "used in the stattute is synonomous with that term at the "common law. It refers to the infliction of a wrongful injury "intentionally. Such a wrong is actionable even though the "same purpose, if formed and executed by an individual, "would not in contemplation of law be considered sufficiently "serious to call successfully for legal redress. There is noth-"ing in this militating at all against the right of individuals "to combine and associate together for the purpose of pro-"moting their individual welfare in any legitimate way. It "strikes only at the assertion of a right of combining to re-"sort to the use, as a single power, of the individual abilities "and resources of two or more to wrongfully accomplish "harm to another in the line of those things mentioned in the "statute. It is in harmony with the doctrine, so definitely "stated by Baron Brammel in Reg. vs. Druitt, 10 Cox, Cr. Cas.

"593, that it has often been quoted by courts and text-writers "and nowhere rejected: 'The liberty of a man's mind and "will to say how he shall bestow himself and his means, his "talents and his industry, is as much a subject of the law's "protection as that of his body;' and 'if any set of men agree "among themselves to coerce that liberty of mind and "thought by compulsion and restraint, they are guilty of a "criminal offense.'"

Ib., pages 262, 263,

and it was held that the complaint sufficiently alleged a violation of the statute *thus construed.*

This complaint, as will appear, was merely the complaint on which the warrants were issued and the plaintiffs apprehended. The information which followed and on which they were tried and convicted, was in all material respects the same as the complaint under which the statute was thus construed. (See information, Rec. 16; also complaint, 110 Wis., 193.)

As will be seen from the record (page 7) the judgment here complained of did not give any broader or different construction to the statute from that formerly announced on the question of the sufficiency of the preliminary complaint. On the contrary, it was expressly based upon the understanding of the court that the defendants had in effect confessed the charges contained in the information and pleaded guilty to a violation of the statute as formerly construed, and that such former decision was therefore in all respects *res judicata* upon all the questions involved.

This, as set forth in the record herein, is so pointedly and explicitly stated by the Court as the grounds of the judgment complained of that for the convenience of this Court we venture to quote from the opinion and the grounds thereof as follows:

(After a statement of the preliminary facts.)

"The plaintiffs in error thereupon each in his own behalf "refused to plead over to the information, admitted all the "allegations thereof, but insisted that the acts charged do "not constitute punishable offense. Thereupon the plaintiffs

"in error were severally adjudged guilty as charged in the "information, *and punishment therefor was duly* imposed by "the judgment of the Court. * * *

"From the foregoing statement it appears that all the "questions raised in the Court below by plaintiffs in error "were considered and decided against them in State vs. "Aikens, State vs. Huegin, and State vs. Hoyt, 110 Wis., 189. "The trial Court followed that decision as it was bound to do. "As we understand the matter the information contains the "same charge as the one set forth in the complaint, the plain- "tiffs in error in effect pleaded guilty thereto, admitting the "doing of all the acts charged against them, and they were "thereupon duly adjudged guilty and sentenced. In that "view the judgments must be affirmed, as all questions in "regard to the matters are *res adjudicata* as before indicated." (Rec. 6, 7.)

As will be seen from the information (Rec. 16) and the complaint before referred to, it was expressly charged that the combination and agreement were entered into and the specified acts pursuant thereto done for the purpose and with the intent of *willfully and maliciously* injuring The Journal Company and the other parties named, in their trade, business and occupation.

It had been held by the Supreme Court of the State in the decision first referred to, that the natural result of the agreement and combination if carried into execution would so obviously be to injure The Journal Company, and that the possible benefits of the combination to the parties thereto were apparently so remote, that in view of the rule that persons are presumed to intend the natural and probable consequences of their acts, it could not reasonably be said that the combination was formed for any other purpose than for the purpose of wilfully and maliciously injuring The Journal Company, using the word "maliciously" in the sense of the term at common law.

State ex rel Durner vs. Huegin, supra, at pages 249, 251.

It seems to be contended here by plaintiffs in error that the allegations of their pleas "that those acts, intentions, agreements and combinations were done or made and entered into in *trade competition*, and that such acts, intentions, agree-

ments and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," properly construed were sufficient in law to negative the charge of malice contained in the information, and which the state Supreme Court had held as before stated was a necessary ingredient of the offense under the statute. The Court, however, did not so understand or construe the allegations quoted, but evidently took the view that it being previously admitted in effect that the combination was formed for the purpose of maliciously injuring The Journal Company the allegations to the effect that the motive for such injury was inspired by trade competition or business rivalry was not a sufficient excuse. In this, it is submitted, the Court was right. It might be very advantageous from a business point of view, for example, for a business competitor to burn his rival's place of business or even to slay such rival, but it would scarcely be admitted as a defense in such a case that there was no personal feeling in the matter, but that the act was done merely to gain a business advantage. These are extreme illustrations but they serve to show that if there be no other legal justification or excuse for an act, the mere fact that it may have been done "in trade competition" does not make it lawful. But if it be conceded for the sake of argument that the state Court was wrong in that it may have not have given proper effect to the averments of the pleas of the plaintiffs in error which were intended to be a justification or excuse for their admitted acts and conduct, this obviously would not have the effect of extending the meaning or construction of the statute to cover combinations in which there was no element of malice or wrongful intent to injure, but would at most merely amount to an error of the Court, in construing the allegations of the pleas.

The statute, therefore, stands as construed by the decision in *State ex rel Durner vs. Huegin*, supra, which construction under the settled rules of this Court is conclusive here.

So construed the statute is merely declaratory of the common law.

Hawkins' Pleas of the Crown, Ch. 27, Sec. 2;
Rex vs. Eccles, 1 Leach, 274;
Chitty Cr. Law, 1139;
Archibold Criminal Practice and Pleading, 1829;
Queen vs. Kendrick, 5 Q. B. D., 49.

Authorities in this country to the same effect might be multiplied indefinitely. For example, see

Crump vs. Commonwealth, 84 Va., 927;
State vs. Stewart, 59 Vt., 273;
State vs. Donnelson, 32 N. J. L., 151, 156;
State vs. Glidden, 55 Conn., 46;
People vs. Petheram, 64 Mich., 252;
State vs. Burnham, 15 N. H., 403;
Commonwealth vs. Carlisle, Brightly, 36.

The language of Mr. Chief Justice Gibson in the case last cited is so pertinent that we venture to quote it:

"A combination is criminal when the act to be done has a "necessary tendency to prejudice the public or to oppress in- "dividuals by unjustly subjecting them to the power of the "confederates. It will therefore be perceived that the motive "for combining, or what is the same thing, the nature of the "object to be attained as a consequence of the lawful act, is "in this class of cases the discriminating circumstance. "Where the act is lawful for an individual it can be the sub- "ject of a conspiracy when done in concert only where there "is a direct intention that injury shall result from it, or where "the object is to benefit the conspirators to the prejudice of "the public or the oppression of individuals, and where such "prejudice or oppression is the natural and necessary con- "sequence."

Even a cursory review of the adjudicated cases is sufficient to demonstrate that the general definition of conspiracy at common law frequently found in the books, to-wit: that it is a combination of persons to do an act unlawful in itself, or an act not in itself unlawful by unlawful means, is not strictly accurate or sufficiently comprehensive to cover all cases.

Take, for illustration, a combination to do an act highly immoral or against recognized rules of public policy. Here the act in itself may not be unlawful, nor need the means by which it is to be accomplished be in themselves unlawful; yet it is thoroughly established that such a combination was illegal and indictable at the common law.

(See the exhaustive review of the law of criminal conspiracy in State vs. Buchanan, 5 Harris & Johnson, 317.)

In *Farmers' Loan & Trust Company vs. Northern Pacific R. R. Co.*, 60 Fed Rep., 803, at page 817, it was said, referring to the statute in question and other cognate provisions:

"These statutes are declaratory of the common law and "wholly condemn all conspiracies to injure or oppress or to "interfere with the rights of others."

In Arthur vs. Oakes, 63 Fed. Rep. 310, decided by the Court of Appeals for the 7th Circuit, Mr. Justice Harlan in the course of an exhaustive discussion and review of the rules and principles of the common law governing the offense of conspiracy, said:

"The principle that a combination or conspiracy of two "or more persons to injure the rights of others is illegal, al- "though nothing may have been done in execution of that in- "tent, has been embodied in the Statutes of Wisconsin, in "which state the present cause is pending,"

citing and quoting the statute here in question. *Ib. page 325.*

It would savor of supererogation to multiply authorities to the effect that the statute as construed by the ultimate tribunal of the state is merely declaratory of the common law, and in that view it is, of course, unnecessary to argue that the statute is not unconstitutional. No provision of the state or federal constitution has been referred to which gives to any individual or combination of individuals the right to commit acts which were recognized as crimes at the common law.

II.

It was not necessary, even at common law, to make a combination formed for the purpose of injuring the business of another illegal that such purpose should be the sole or

ultimate object of the combination. It was sufficient if there were a direct and immediate purpose to injure others, even though the ultimate object were to benefit the parties to the combination:

People vs. Petheram, 64 Mich., 252, 261, 262;
Arthur vs. Oakes, 63 Fed., 310;
Hopkins vs. Oakley Stave Co., 83 Fed. Rep., 912;
Temperton vs. Russell (1893), 1 Q. B. Div., 715;
Steamship Co. vs. McGregor, 23 Q. B. Div., 715;
Quinn vs. Leathem (*House of Lords, 1901*), Law Rep. App. Cas., 495.

"A combination for the purpose of injuring another is a combination directed personally against the party to be injured, and the law allowing parties to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their purpose the immediate hurt of another:"

Greenhood on Public Policy, 651.

From the authorities, it would seem that the lawfulness or unlawfulness of a combination, the result of which was or might be to injure the business of others, turned at the common law upon the question of the intent with which the combination was formed; the question of the primary or immediate purpose—whether the injury to others was incidental, indirect and consequential, or was the immediate and direct purpose of the combination, notwithstanding the ultimate object might be advantage to the parties to the combination

It would be a hopeless task, as well as a useless one, to undertake to review the almost innumerable cases on the subject; but it is submitted that practically all the cases can be reconciled on the ground immediately above suggested. As examples of the many cases that might be cited illustrating the doctrine of the common law on the subject, we submit the following:

Arthur vs. Oakes (*C. C. A.*), 63 Fed., 323, *supra;*
Doremus vs. Hennesy, 176 Ill., 608;

Barr vs. Trades Councils (*N. J. Chan.*), 30 Atl Rep., 881;
Hilton vs. Eckersley, 6 El. & Bl., 47, 74;
Steamship Co, vs. McKenna, 30 Fed., 48;
Casey vs. Typographical Union, 45 Fed., 138;
Callan vs. Wilson, 127 U. S., 547;
Mogul S. S. Co. vs. McGregor, 23 Q. B. Div., 598; A. C., 25;
Continental Ins. Co. vs. Board of Underwriters, 67 Fed., 319;
Temperton vs. Russell, 1 Q. B. Div., 715;
Walker vs. Cronyn, 107 Mass., 555;
Graham vs. St. Charles St. Ry. Co., 27 R. L. A., 416;
Hopkins vs. Oakley Stave Co., 83 Fed., 918;
Quinn vs. Leathem, Law Rep. App. Cas. (1901), 515. overruling *Allen vs. Flood*, *H. L. Appeal Cases* (1898), 1.

We think it may be said that the authorities conclusively establish the following propositions:

1. The *civil action of conspiracy* at common law was a substantive right of action, and did not necessarily depend upon any wrong or violation of legal right independent of the combination feature.

(a) The fact of the combination and the element of malice might give a right of action where, without the conjunction of the combination and malice, no action would lie.

(b) In order, however, to give rise to a right of civil action, actual damage must have resulted.

2. The *crime of conspiracy* at common law was a substantive offense, not necessarily dependent upon the inherent criminality or unlawfulness of the thing to be done or of the measures by which it was to be accomplished.

(a) It had its foundation in public policy and in the peace and welfare of society, and had no necessary connection with any question of civil damages or pecuniary loss to particular individuals.

It is obvious from the authorities that the rule which ordinarily prevails in civil actions, that the motive or

intent with which an act is done is not an element of the cause of action, is not generally applicable to civil actions of conspiracy, and is not applicable at all to conspiracy in its criminal aspects any more than to any other criminal offense. Likewise, the general rule that what may be lawfully done by one may with equal propriety be done by many is manifestly not applicable to the case of conspiracy.

As illustrating the distinction between the civil action and the criminal offense, and the principles on which each rests, see

6 Amer. & Eng. Enc. (New Ed.), 872.
Bishop on Non-Contract Law, Sec. 592;
Clifford vs. Brandon, 2 Campbell. 358;
Boutwell vs. Marr, 71 Vt., 6.

III.

Even were it conceded that the intent of the statute was to enlarge the scope of the protection afforded by the common law to the freedom of trade and competition so as to comprehend within its purview all combinations whether formed for the direct purpose of injuring the business of another, or for the purpose of benefiting the parties to the combination by wilfully injuring the business of others, it would still be clearly within the limits of legislative authority.

The state has a direct interest in the encouragement and protection of individual enterprise, and to that end, independently of the question of motive or intent, it may make all reasonable regulations to protect the individual from the unequal power of combinations. The basis of this interest is public policy—the basis of authority for all police regulations. *U. S. vs. Trans-Missouri Freight Association, 166 U. S. 290.* In the interest of public policy the legislature may authorize a monopoly: *Slaughter-House Cases*, 16 Wall. 36. Conversely, it may prohibit monopolies, a power very frequently exercised. Between these two extremes its power is plenary to regulate or restrict the power of combinations to hamper or destroy individual enterprise, individual effort. To promote

and protect the healthy and orderly growth of business, of the industrial and commercial interests of the state is one of the chief purposes of government. It is separate action that begets competition; competition that promotes progress. To protect the individual against the combined strength of the multitude is not only a right but the duty of the state. The right to earn a living, to carry on his business free from malicious interference, free from the unequal power of combinations formed to harass, oppress and destroy is one of the recognized rights of the individual member of a civilized society. To secure this right, to secure the peace, prosperity and happiness of the people, to secure its own existence the state must have the power to say that combinations formed to control or restrict trade; combinations to injure, destroy, molest or disturb the right of the individual to carry on his business in his own way, are illegal.

The ground on which the constitutionality of the present statute is challenged seems to be that it is an undue restriction of the right of individuals to combine for the purpose of using their joint efforts to promote their own business welfare. The question in the aspects in which it is presented seems so entirely free from novelty, that any extended discussion thereof on our part could hardly be profitable. The subject is fully covered by recent cases in this court, such for example as *U. S. vs. Trans-Missouri Freight Association, Supra.*

We call the attention of the court to a few of the many cases that might be cited illustrative of the limitations upon the scope of the federal constitution to abridge the powers of the state to regulate its internal affairs affecting the peace, order and general welfare of the community:

Allgeyer vs. Louisiana, 165 U. S., 589;
Munn vs. Illinois, 94 U. S., 113, 124;
Slaughter-House Cases, 16 Wall., 62;
Barbier vs. Conway, 113 U. S., 31;
Soon Hing vs. Crowley, 113 U. S., 709.

As said by Mr. Justice Miller in the Slaughter-House Cases *supra*, at page 62: "This police power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comforts of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property. It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or upon acknowledged general principles ever can be, made."

Also Mr. Justice Field in *Barbier vs. Conway, 113 U. S.*, at page 31:

"But neither the amendment" (the 14th),—"broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity."

Under this power the legislature of the state of Wisconsin has provided "that every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal": *General Statutes of Wis., 1898, Sec. 1747e.*

The same statute further provides: "Every person who shall combine or conspire with any other person to monopolize, or attempt to monopolize any part of the trade or commerce in this state" (Wisconsin) "shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state" (Wiscon-

sin) "for all damages he may sustain by reason of the doing of anything forbidden by this section."

The foregoing statute was passed in 1893 and was copied substantially from the act of Congress on the same subject known as the Sherman act, the validity of which has been sustained by this Court.

Similar statutes to the one here called in question have been in force in other states for many years and their constitutionality has been uniformly upheld or assumed without question.

Section 168 of the Penal Code of the state of New York makes it a misdemeanor for two or more persons to conspire to do an act injurious to the public health, public morals, or to trade or commerce, etc. That statute, it will be seen, is much broader in its terms than the statute here under consideration. It was construed by the highest Court of the state of New York in a very extreme case, and its constitutionality was not questioned:

People vs. Sheldon, 139 N. Y., 251; 34 N. E. Rep., 785.

Later its validity was attacked and expressly upheld in *Matter of Davies, 168 N. Y., 89, 101.*

In Illinois it is made a criminal offense "for two or more persons to wilfully and maliciously combine or conspire together to obstruct or impede, by any act or by means of intimidation, the regular operation and conduct of the business of any railroad company or any other corporation, firm or individual in the state.":

Rev. Stats. of Ill., Sec. 130.

In Indiana it is made a crime to coerce an employe by making non-membership in any labor organization a condition of employment:

Burns' Stats., Sec. 2302.

In Iowa, by Section 5059 of the General Statutes of that state, it is made a crime to conspire "wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, etc".

In Minnesota (Stats. of 1894, Sec. 6423) it is made a crime to combine to prevent a person from procuring employment by threats, promises or the circulation of black-lists, or to procure the discharge of an employe.

In New Hampshire, by the Public Statutes of 1891, (Ch. 266, Sec. 12) it is made a crime "to interfere in any way whatever to *injure or damage* another in his person or property while engaged in his lawful business, trade or occupation, or while on the way to or from the same; or to endeavor to prevent any person from engaging in his lawful business, trade or calling."

In Rhode Island, by the General Laws of 1896 (Ch. 279, Sec. 45), it is a crime "to wilfully and maliciously or mischievously * * * obstruct another in the prosecution of his lawful business or pursuits, in any manner."

It will be seen that these various statutes, while differing somewhat in their terms and scope, are all directed to substantially the same end, to-wit: the encouragment of industry, by the prevention of malicious interference therewith, and the prohibition of combinations organized and intended for the purpose of hampering, hindering or destroying individual enterprise in legitimate trade and commerce. The fact that such statutes so generally prevail in the various states is strong evidence, not only of the necessity for such restraints, but of the general policy of legislation on the subject and the understanding of the Courts that such statutes are not without the legislative power.

Respectfully,

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

me
ent
to

Ch.
at-
rty
on,
to
ss,

79,
ev-
his

er-
to
in-
th,
led
di-
act
tes
ch
he
ch

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 3.	Andrew J. Aikens, Plaintiff in Error, *vs.* The State of Wisconsin.	In error to the Supreme Court of the State of Wisconsin.
No. 4.	Albert Huegin, Plaintiff in Error, *vs.* The State of Wisconsin.	
No. 5.	Melvin A. Hoyt, Plaintiff in Error, *vs.* The State of Wisconsin.	

[November 7, 1904.]

Mr. Justice HOLMES delivered the opinion of the Court.

These are three writs of error to the Supreme Court of Wisconsin, brought to set aside convictions and sentences of the plaintiffs in error, the defendants below, upon informations filed by the District Attorney. (113 Wis. 419.) The ground of the writs is that the proceedings violated the rights of the plaintiffs in error under the Fourteenth Amendment of the Constitution of the United States. The informations were brought under the Wisconsin statutes of 1898, § 4466*a*, which impose imprisonment or fine on "any two or more persons who shall combine . . . for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever," &c. The plaintiffs in error were severally charged with unlawfully combining together with the intent of wilfully and maliciously injuring The Journal Company, a corporation, and certain persons named, stockholders and officers of the company, in their trade and business. It was alleged that the company was publisher of a newspaper in Milwaukee and had notified an increase of about twenty-five per cent in its charges for advertising, and that thereupon the plaintiffs in error, who were managers of other newspapers in the same place, in pursuance of their combination and with the intent of wilfully, maliciously and unlawfully injuring The Journal Company and the others named, agreed as follows: If any person should agree to pay the increased rate to The Journal Company, then he should not be permitted to advertise in any of the other three newspapers except at a corresponding increase of rate; but if he should refuse to pay The Journal Company the increased rate, then he should be allowed to advertise in any of the other three

papers at the rate previously charged. It was alleged that this conspiracy was carried out and that much damage to the business of The Journal Company ensued.

The defendant Hoyt demurred to this information, setting up the Fourteenth Amendment. Aikens and Huegin filed pleas which admitted the combination and intent of injuring The Journal Company and the resulting damage but alleged that the combination was entered into in trade competition and that the parties had the right to make it under the Fourteenth Amendment. The State demurred to the pleas. The demurrer of Hoyt was overruled; those of the State were sustained. The defendants were sentenced and the judgment of the trial court was affirmed by the Supreme Court of the State on the authority of an earlier decision between the same parties, reported in 110 Wis. 189.

The statute, it will be observed, punishes combining for the purpose of wilfully or maliciously injuring another in his business. If it should be construed literally, the word "wilfully" would embrace all injuries intended to follow from the parties' acts, although they were intended only as the necessary means to ulterior gain for the parties themselves. Taken in that way the word would hit making a new partnership, if it was intended thereby to hurt some one else's business by competition. We shall not consider whether that branch of the statute, so construed, could be sustained and express no opinion about it. The Supreme Court of Wisconsin has intimated that a narrower interpretation will be adopted, and in the present case we have to deal only with the other branch, depending on the word "maliciously," as we shall explain in a moment. The last quoted word we must take as intended to add something to the word "wilfully," and we can do so only by taking it in its true sense. We interpret "maliciously injuring" to import doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired. Otherwise the phrase would be tautologous, since a wilful injury is malicious in the sense familiar to declarations and indictments, where indeed the word means no more than foreseen, or even less than that. A death is caused of malice aforethought if, under the circumstances known to the actor, the probability of its ensuing from the act done is great and manifest according to common experience. *Commonwealth* v. *Pierce*, 138 Mass. 165, 178; 1 East P. C. 262. See also *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 613.

The informations alleged a combination for the purpose of wilfully and maliciously injuring others, and therefore brought the case within the latter branch of the statute, if there are two and if "or" in the act is not taken to mean "and." It is true that the plan is set forth, and some argument was spent on whether that plan might or might not be an instrument of ultimate gain. But while that question may have been open when the

State Court was discussing the evidence warranting a commitment, in 110 Wis. 189, none such is open here. The malevolent purpose is alleged, it is admitted by the demurrer, it is not sufficiently denied by the pleas, whatever we may conjecture would have been done if counsel had had this decision before them. A purely malevolent act may be done even in trade competition.

We come then to the question whether there is any constitutional objection to so much of the act as applies to this case. It has been thought by other courts as well as the Supreme Court of Wisconsin that such a combination followed by damage would be actionable even at common law. It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 613; *S. C.*, [1892] A. C. 25. If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land, are absolute, *Bradford* v. *Pickens*, [1895] A. C. 587, others may depend upon the end for which the act is done. *Moran* v. *Dunphy*, 177 Mass. 485, 487; *Plant* v. *Woods*, 176 Mass. 492; *Squires* v. *Wason Manuf. Co.*, 182 Mass. 137, 140, 141. See cases cited in 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. *Quinn* v. *Leathem*, [1901] A. C. 495, 524.

Whether, at common law, combination would make conduct actionable which would be lawful in a single person it is unnecessary to consider. *Quinn* v. *Leathem*, [1901] A. C. 495. We are aware too that a prevailing opinion in England makes motives immaterial, although it is probable that in *Allen* v. *Flood*, [1898] A. C. 1, 94, the jury were instructed, as in *Temperton* v. *Russell*, [1893] 1 Q. B. 715, 719, in such a way that their finding of malice meant no more than that the defendant had acted with foresight of the harm which he would inflict, as a means to an end. *Quinn* v. *Leathem*, [1901] A. C. 495, 514. However these things may be, we have said enough to show that there is no anomaly in a statute, at least, which punishes a combination such as is charged here. It has been held that even the free use of land by a single owner for purely malevolent purposes may be restricted constitutionally, although the only immediate injury is to a neighboring land owner. *Rideout* v. *Knox*, 148 Mass. 368. Whether this decision was right or not, when it comes to the freedom of the individual, malicious mischief is a familiar and proper subject for legislative repression. *Commonwealth* v. *Walden*, 3 Cush. 558. Still more

are combinations for the purpose of inflicting it. It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the Fourteenth Amendment was intended to preserve. The statute was assumed to be constitutional in *Arthur* v. *Oakes*, 63 Fed. R. 310, 325, 326.

But if all these general considerations be admitted, it is urged nevertheless that the means intended to be used by this particular combination were simply the abstinence from making contracts, that a man's right so to abstain cannot be infringed on the ground of motives, and further, that it carries with it the right to communicate that intent to abstain to others and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts. "The very plot is an act in itself." *Mulcahy* v. *The Queen*, L. R. 3 H. L. 306, 317. But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

It was urged farther that to make a right depend upon motives is to make it depend upon the whim of a jury and to deny the right. But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved. The power of the legislature to make the fact of malice material we think sufficiently appears from what we already have said.

Finally it is argued that the Supreme Court of Wisconsin would hold that the statute extends to acts of which the motives were mixed and which were done partly from disinterested malevolence and partly from a hope of gain. If so, it is said, the statute would be open to all the objections at which we have hinted in dealing with the word "wilfully." The Supreme Court did use some language which looked that way, but we consider it to have decided that the statute would be confined to combinations with intent to do wrongful harm. 110 Wis. 193, 260. Thus limited, on whatever

ground, the statute would punish only combinations of a kind for which no justification could be offered and those which were taken out of the justification by the motive with which they were made. We see no sufficient reason to believe that the Court will go farther or construe the act in such a way as to raise questions which we need not go into here. Therefore it is unnecessary to consider whether, on a more literal construction, the portion dealing with malicious intent could be separated from that which deals with the purpose of merely wilful injury, and saved, even if the latter were held to go too far. Probably the two phrases will be read together and the statute made unquestionable as a whole.

Judgment affirmed.

Mr. Justice WHITE dissenting.

Not being able to concur in the conclusion of the Court that the opinion of the Supreme Court of Wisconsin has affixed to the statute of that State a much narrower meaning than the text of the statute imports, and thinking, on the contrary, that not only such text but the construction of the statute adopted by the Supreme Court of Wisconsin operates to deprive the citizen of a lawful right to contract protected by the Fourteenth Amendment, I dissent.

True copy.

Test:

Clerk Supreme Court, U. S.